

# BENEATH THE PROPERTY TAXES FINANCING EDUCATION

Timothy M. Mulvaney\*

*Many states turn in sizable part to local property taxes to finance public education. Political and academic discourse on the extent to which these taxes should serve in this role largely centers on second-order issues, such as the vices and virtues of local control, the availability of mechanisms to redistribute property tax revenues across school districts, and the overall stability of those revenues. This Essay contends that such discourse would benefit from directing greater attention to the justice of the government's threshold choices about property law and policy that impact the property values against which property taxes are levied.*

*The Essay classifies these choices into three categories: structural choices relating to infrastructure and land use; financial choices relating to subsidies and exemptions; and protective choices relating to forestalling natural and human-induced adversities. This taxonomy reveals that if the government made different choices surrounding the content of property rights, those choices would produce different property values and, thus, different distributions of the property tax revenues that finance public education. The Essay distills a series of norms—circumstance-sensitivity, antidiscrimination, and interconnectedness—that can serve as a useful starting point for a justice-inspired evaluation of these omnipresent choices about property that are inevitably linked to educational opportunity and delivery.*

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\* Professor of Law, Texas A&M School of Law. Thank you to Derek Black, Vanessa Casado Pérez, Nestor Davidson, Joseph W. Singer, Kenneth Stahl, Laura Underkuffler, and Peter Yu for their insightful feedback. I benefited from the opportunity to present components of this project at Columbia Law School, Harvard Law School, and Northwestern University Pritzker School of Law.

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## INTRODUCTION

The importance of elementary and secondary education to human flourishing, economic opportunity, and effective participation in democratic life has been acknowledged at the highest levels of American government.<sup>1</sup> Nevertheless, education has traditionally been classified as a “local good.”<sup>2</sup> While select states support this local good through a heavy reliance on state revenues for which sales and income taxes are the

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1. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”); see also *Plyler v. Doe*, 457 U.S. 202, 222 (1982) (“[E]ducation prepares individuals to be self-reliant and self-sufficient participants in society.” (internal quotation marks omitted) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972))); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30 (1973) (noting the “grave significance of education both to the individual and to our society” (internal quotation marks omitted) (quoting *Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280, 283 (W.D. Tex. 1971), rev’d, 411 U.S. 1 (1973))); *Robinson v. Cahill*, 355 A.2d 129, 132 (N.J. 1976) (describing New Jersey legislation as establishing the goal of “provid[ing] to all children . . . the educational opportunity which will prepare them to function politically, economically and socially in a democratic society” (internal quotation marks omitted) (quoting N.J. Stat. Ann. § 18A:7A-4 (West 1975))); Tyll van Geel, *The Courts and American Education Law* 18 (1987) (noting that all fifty states have compulsory education laws); Palma Joy Strand & Nicholas A. Mirkay, *Racialized Tax Inequity: Wealth, Racism, and the U.S. System of Taxation*, 15 *Nw. J.L. & Soc. Pol’y* 265, 297 (2020) (“In the twentieth century, the United States became a leader among nations as a result of its investment in its most valuable resource: its people. . . . Investing in young people tells them . . . they are valued and valuable, opens the door to opportunity, and brings them into the realm of citizenship.”).

2. See Mildred Wigfall Robinson, *Financing Adequate Educational Opportunity*, 14 *J.L. & Pol.* 483, 486 (1998). Case in point, the Supreme Court declared a half century ago in *San Antonio Independent School District v. Rodriguez* that the federal Constitution does little to constrain state and local government discretion in determining the revenue sources from which to fund public education. See 411 U.S. at 58 (“The consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various States . . .”).

primary sources,<sup>3</sup> most turn in sizable part to local revenues that are overwhelmingly derived from property taxes.<sup>4</sup>

Political and academic discourse on the extent to which property taxes should serve in this role regularly centers on three overarching issues: the vices and virtues of local control, the availability of mechanisms to redistribute property tax revenues from more affluent school districts to less affluent ones, and the overall stability of those revenues.<sup>5</sup> This discourse is critical in helping evaluate the consequences of taxing property values to finance education vis-à-vis the consequences of the various alternative approaches to structuring taxing and spending policy in the education space. As critical as they are, though, these issues are second order in the sense that their resolution is inextricably tied to first-order choices about property law and policy that impact the property values against which property taxes are levied.<sup>6</sup> This Essay contends,

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3. Derek W. Black, *Educational Gerrymandering: Money, Motives, and Constitutional Rights*, 94 N.Y.U. L. Rev. 1385, 1406 (2019) [hereinafter Black, *Educational Gerrymandering*] (noting that “two states finance the primary cost of public education themselves,” while “the rest place substantial school funding burdens on local communities”).

4. EdBuild, *Fractured: The Accelerating Breakdown of America’s School Districts I* (2019), <https://edbuild.org/content/fractured/fractured-full-report.pdf> [<https://perma.cc/GB7Z-K8QY>] (“Nearly half of all education funding comes from local sources, primarily property taxes drawn from within school district borders.”); Nat’l Ctr. for Educ. Stat., *Public School Revenue Sources, The Condition of Education 2022*, <https://nces.ed.gov/programs/coe/indicator/cma/public-school-revenue> [<https://perma.cc/9LF8-28EC>] (last updated May 2022). The extent to which individual states turn to local revenue sources—and, thus, the property tax in particular—to fund public education varies. Connecticut, Illinois, Maine, Massachusetts, New Hampshire, and New York derive more than 50% of their total education revenue from the local property tax. Id. Colorado, Missouri, Nebraska, New Jersey, Ohio, Pennsylvania, Rhode Island, South Dakota, and Texas follow closely behind, deriving 40–50% of their total education revenue from local property taxes. Id. Another twenty-eight states fall within the 20–40% range. Id. Often prompted by judicial decisions delegitimizing extant district-based approaches, select states draw on a statewide property tax. See Therese J. McGuire, Leslie E. Papke & Andrew Reschovsky, *Local Funding of Schools: The Property Tax and Its Alternatives*, in *Handbook of Research in Education Finance and Policy* 376, 379 (Helen F. Ladd & Margaret E. Goertz eds., 2d ed. 2015) (discussing what amount to statewide property tax schemes in California and Michigan); Laurie Reynolds, *Skybox Schools: Public Education As Private Luxury*, 82 Wash. U. L.Q. 755, 792–94 (2004) [hereinafter Reynolds, *Skybox Schools*] (explaining that the Vermont legislature turned to a statewide property tax to finance education after the state’s Supreme Court invalidated a district-based approach on equal protection grounds).

5. The education finance literature is extensive, and it would be a fool’s errand to attempt to craft a list of all the most prominent works in the field. Part I, however, surveys a selection of the key recent works specifically related to the thesis advanced here.

6. Property taxes are administered against a baseline valuation of both land and the structures thereon that is determined via a government appraisal. Joan M. Youngman, *Defining and Valuing the Base of the Property Tax*, 58 Wash. L. Rev. 713, 715–17 (1983). Such appraisals rest on a jurisdictionally defined measure of value. Id. at 718–20. In most states, the going statutory measure is “fair market value,” that is, an appraisal of what a property would sell for in an arm’s length transaction on the open market. J. Lyn Entrikin, *The Property Tax Netherworld*, 89 Chi.-Kent L. Rev. 289, 294 (2014). There is considerable

therefore, that such discourse would benefit from directing greater attention to the first-order question of how land that is taxed in any property tax scheme gains its value at the outset.<sup>7</sup>

Land values, this Essay asserts, are not the mere product of individual choices and initiatives; they do not simply arise via naked operation of the free market. Rather, they are influenced in important respects by myriad

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debate surrounding the fairness of the appraisal process, particularly given its highly subjective nature. Laura S. Underkuffler, *Takings and the Problem of Value: Grappling With the Truth in Land-Restriction Cases*, 11 *Vt. J. Env't L.* 465, 469 (2010) [hereinafter Underkuffler, *Takings and the Problem of Value*] (“Because of the highly subjective and location-specific nature of amenities effects—including visual amenities, recreational opportunities, wildlife enjoyment, and psychological satisfaction from land preservation efforts—the finding of a comparable piece of land for any newly restricted parcel will be difficult.” (emphasis omitted) (footnote omitted)); Edward A. Zelinsky, *The Once and Future Property Tax: A Dialogue With My Future Self*, 23 *Cardozo L. Rev.* 2199, 2203 (2001) (“The determination of the fair market value of property subject to taxation is one of the most difficult, and most controversial, aspects of the administration of the real property tax.”). Empirical evidence indicates that the burdens of failings in appraisal regimes fall disproportionately on racial minorities and the poor. See, e.g., Bernadette Atuahene & Christopher Berry, *Taxed Out: Illegal Property Tax Assessments and the Epidemic of Tax Foreclosures in Detroit*, 9 *U.C. Irvine L. Rev.* 847, 886 (2019) (deeming it likely, upon review of a large data set on assessment ratios and subsequent foreclosures, that “thousands of Detroit home owners—mostly African-Americans” lost their property in the wake of the Great Recession due to tax assessment procedures that were unjust and likely violated the Michigan Constitution); Christopher Berry, *Reassessing the Property Tax* 9 (Feb. 7, 2021) (unpublished manuscript), [https://cpb-us-w2.wpmucdn.com/voices.uchicago.edu/dist/6/2330/files/2019/04/Berry-Reassessing-the-Property-Tax-2\\_7\\_21.pdf](https://cpb-us-w2.wpmucdn.com/voices.uchicago.edu/dist/6/2330/files/2019/04/Berry-Reassessing-the-Property-Tax-2_7_21.pdf) [https://perma.cc/76R8-6YRM] (highlighting empirical evidence revealing that, in and around Chicago, more expensive properties regularly are undervalued while less expensive properties regularly are overvalued).

This Essay does not focus on these important procedural questions surrounding the various approaches to appraisal. Rather, it contends that, on the appraisal process implemented in any jurisdiction, the value of a given parcel of land is driven in nontrivial part by state choices about the meaning of ownership that are reflected in the relevant jurisdiction’s background laws of property. This contention is consistent with Justice Thurgood Marshall’s brief nod in *San Antonio Independent School District v. Rodriguez* toward the role of land use regulation in creating wealth disparities across school districts. See 411 U.S. at 123–24 (Marshall, J., dissenting) (“[G]overnmentally imposed land use controls have undoubtedly encouraged and rigidified natural trends in the allocation of particular areas for residential or commercial use, and thus determined each district’s amount of taxable property wealth.”); see also Wayne Batchis, *Urban Sprawl and the Constitution: Educational Inequality as an Impetus to Low Density Living*, 42 *Urb. Law.* 95, 104 (2010) (interpreting Justice Marshall’s dissent as declaring that “[i]f a state . . . intentionally draws its internal political boundaries, and then regulates the use . . . of the land within such boundaries effectively predetermining the tax wealth . . . , a state’s ability to . . . subject . . . each district to vastly different treatment should be subject to . . . [strict] scrutiny”).

7. In this sense, the Essay does not assess property taxes as a source of education financing against the backdrop of local disparities in property wealth and the local disparities in spending that can ensue therefrom. Rather, it looks to the laws—property laws—that help create those local disparities in the first place. It therefore focuses on reforming unjust property laws rather than redistributing the revenues gained from taxing property values that are influenced by unjust property laws.

societal choices made by federal, state, and local governments that are reflected in the background laws of property. These laws, both past and present, include structural choices (such as building highways, zoning land, and drawing district boundaries), financial choices (such as allowing mortgage-interest deductions, offering homestead exemptions, and subsidizing flood insurance), and protective choices (such as shielding nonconforming uses, constructing erosion-control devices, and providing disaster relief). Such choices set the terms on which private parties can develop social and economic relationships. Making these choices unavoidably requires normative assertions about the types of relationships to allow and the types of relationships to curtail. In endorsing certain relationships, the government is conferring its power on certain persons at the expense of others; in turn, these persons' exercise of such power in the marketplace dictates property values. It follows that evaluating the justness of the government's taxing property values to fund public education in a given jurisdiction must be informed by evaluating the justness of that jurisdiction's background property laws.<sup>8</sup>

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8. Different jurisdictions adopt different laws surrounding property, and judges in these jurisdictions follow different approaches in interpreting and applying these laws. It follows that the property rules that impact a particular piece of land in one jurisdiction may well be distinct—in some cases, markedly so—from the rules that impact a particular piece of land in another jurisdiction. The evaluation called for here naturally includes an assessment of not only those background property laws adopted in the jurisdiction subject to evaluation but also those background property laws adopted elsewhere that influence values in that jurisdiction. Consider, for instance, the well-known matter of *Southern Burlington County NAACP v. Township of Mount Laurel*, in which the residents of Mount Laurel claimed that they held the authority to preclude construction of affordable housing and thereby price out families on the lower rungs of the income scale. 336 A.2d 713 (N.J. 1975). These residents were of the mind that they owned the value of “their” municipality’s property tax base; in turn, they saw themselves as the justified recipients of the services—including a high-quality public education—financed via “their” property tax revenues. On this general theme, see Lee Anne Fennell, *Homes Rule*, 112 Yale L.J. 617, 625 (2002) (reviewing William A. Fischel, *The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies* (2001)); Gerald E. Frug, *City Services*, 73 N.Y.U. L. Rev. 23, 29–31 (1998) [hereinafter Frug, *City Services*]; Laurie Reynolds, *Taxes, Fees, Assessments, Dues, and the “Get What You Pay For” Model of Local Government*, 56 Fla. L. Rev. 373, 430–31 (2004); Richard Schragger, *Consuming Government*, 101 Mich. L. Rev. 1824, 1827–29, 1847–48 (2004) (reviewing William A. Fischel, *The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies* (2001)). Yet it was the state that drew the lines that delineated Mount Laurel from neighboring Camden in the first place. The choice to draw those lines where the state drew them is in and of itself a distributional choice that has marked effects on values. The same can be said for the very tool that the residents of Mount Laurel sought to deploy: Adopting a zoning scheme that effectively excludes the poor from living in Mount Laurel would, of course, heavily influence property values in Mount Laurel. It also, though, would have derivative impacts on property values in Camden. As one scholar described it, “To treat Mount Laurel as an autonomous owner of ‘its’ property tax base is to ignore its necessarily parasitic relationship with neighboring jurisdictions.” Schragger, *supra*, at 1850; see also Rachel Alterman, *Land-Use Regulations and Property Values: The “Windfalls Capture” Idea Revisited*, in *The Oxford Handbook of*

Proposing such an evaluative exercise is not to suggest that undertaking it will produce a universalizable decree as to how education should be financed across the country.<sup>9</sup> It is true that if the property laws applicable in a given jurisdiction operate in concert with one another to create an unjust property system, any model for financing education (or, for that matter, any other public service) that is based on that system will lead to unjust outcomes. But this revelation alone is not reason enough to determine that public schools should be financed via an alternative revenue source, such as income taxes, sales taxes, or so-called “sin” taxes.<sup>10</sup> Reaching that conclusion would require a critical assessment of the justice of the laws that influence the values of the objects against which these non-property taxes are levied, as well as an evaluation of the second-order consequences of taxing those values. Those comparative assessments are well beyond the scope of this Essay. The goal here is a much narrower one: to deepen the discourse on the property tax option by encouraging analysts to direct more attention than they have to date on the influences

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Urban Economics and Planning 755, 761 (Nancy Brooks, Kieran Donaghy & Gerrit-Jan Knaap eds., 2012) (referring to “shifting values” across localities).

9. The Essay does, though, operate on the assumption that the local taxation of property is a constitutionally viable option to fund education. It does not, therefore, address the charge, advanced by some scholars and endorsed in select states, that state constitutions should be interpreted to require states to provide education through state revenues rather than local revenues. See, e.g., Laurie Reynolds, *Uniformity of Taxation and the Preservation of Local Control in School Finance Reform*, 40 U.C. Davis L. Rev. 1835, 1871 (2007) [hereinafter Reynolds, *Uniformity of Taxation*] (“[S]tate constitutional requirements of uniform taxation should apply to invalidate state reliance on the local property tax for fulfillment of a state constitutional obligation . . .”). Still, at least to the extent that such a charge is grounded in the view that disparities in property wealth make the linkage between property wealth and school revenues problematic, see, e.g., Maurice Dyson, *The Death of Robin Hood? Proposals for Overhauling Public School Finance*, 11 *Geo. J. on Poverty L. & Pol’y* 1, 17 (2004) (explaining claimants’ position that, for the 1998–1999 academic year, Highland Park Independent School District in Dallas County had an average per pupil property wealth of \$643,000, while the Boles Home Independent School District in another part of the same county had an average per pupil property wealth of less than \$6,000), there are connections between that charge and the thesis advanced here in the sense that more just property laws would make that linkage more just. In other words, a more just property system would mitigate some of the inequalities or inadequacies in educational support that litigants challenging locally funded approaches have emphasized. Reynolds, *Uniformity of Taxation*, *supra*, at 1851–52 (describing how litigation initially “sought to neutralize the fiscal disparity that came from heavy reliance on the local property tax” by reformulating funding formulae before later “accept[ing] the inequality inherent in a system that relies on local property tax funding” to focus on the “absolute gauge of inadequacy”).

10. Professor Laurie Reynolds has explained that there is “little consensus” among critics of financing education through local property taxes in terms of what revenue source should replace the property tax and noted that “overall school funding levels frequently drop when the state assumes greater responsibility for education.” See Reynolds, *Skybox Schools*, *supra* note 4, at 811.

that property laws have on the values against which property taxes are levied.<sup>11</sup>

To advance the thesis that evaluating the justness of the government's reliance on property taxes to fund public education in a given jurisdiction must be informed by evaluating the justness of the background property laws in that jurisdiction, the Essay proceeds in three Parts. Part I suggests that a discourse that concentrates exclusively on the consequences of the government's choice to tax property values for the purpose of financing education runs the risk of underappreciating the extent to which government choices impact how those values came to be in the first place. Such a course, in turn, leaves space for proliferation of the view that land values are simply the product of individual exchange in a self-regulating market when, in actuality, property also serves a communal function: The rules and standards reflected in property laws set the terms by which individuals can engage in market exchanges by predetermining which social and economic relationships are and are not legitimate in a modern democracy that respects freedom, equality, and human dignity. In fulfilling this term-setting function, the government influences property values quite extensively.

Part II depicts how government choices that determine the contours of property rights come in a variety of forms—some structural, others financial, and still others protective—and influence property values in different ways. This depiction is not meant to be all-inclusive, but rather to illustrate via a range of examples just how sizable the government's footprint is in determining the property values at which property taxes take aim.

Part III sets out a series of norms to help guide the evaluation of these various value-influencing property laws, on the view that reforms consistent with these norms will, given these laws' inevitable connection to property taxes, have derivative effects on educational opportunity and delivery. These norms—the first of which is process-oriented, the second of which is substantive, and the third of which offers a conceptual bridge between the first two—include a sensitivity to the circumstances of how property law operates in a given community rather than leaning on assumptions about “typical” communities; acknowledgment of the current effects of both prior and present-day discriminatory practices surrounding property; and attention to the ways that property laws do not exist in isolation but are instead intricately integrated with each other.

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11. It may be that, in the end, alternative models of education finance emerge in every jurisdiction that are more just than the property tax option. However, in a given jurisdiction, the type of justice-inspired evaluation advanced here may reveal that, when all is said and done, property taxes are a superior source of education financing than the alternatives. And it is the case that, when evaluating two jurisdictions under this framework, it is more appropriate to rely on property taxes in the jurisdiction with the more just property laws than it is in the other.

I. FUNDING SCHOOLS VIA PROPERTY TAXES:  
COMPETING CONCEPTIONS OF PROPERTY

It is often difficult to link specific taxes to specific expenditures at the federal and state level, such that tax scholars regularly separate analyses of the two.<sup>12</sup> When it comes to education finance, however, the link between property taxes and education spending is clearer. As a simple empirical matter, property tax revenues make up the bulk of local government budgets,<sup>13</sup> and a sizable share of those budgets is directed to education spending.<sup>14</sup> Moreover, states affirmatively draw school district boundaries to, among other purposes, determine to which specific properties and in what proportion that education spending is dedicated.<sup>15</sup>

Against this backdrop, assessing the prudence of financing education through local property taxation requires an evaluation across two orders. First-order issues center on the drivers of the land values against which property taxes are levied.<sup>16</sup> Second-order issues, meanwhile, take land values as they are and hone in on the consequences of the government's decision to tax those values in order to finance education. As the first section below recounts, scholarly discourse on education finance concentrates heavily on the latter. The second section suggests that this heavy concentration on second-order issues carries with it the prospect of underappreciating the extent to which government choices impact the

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12. See, e.g., Gary S. Becker & Casey B. Mulligan, *Deadweight Costs and the Size of Government*, 46 *J.L. & Econ.* 293, 304 (2003) (“[T]he typical economic analysis takes government spending as given when analyzing the effects of changes in the tax system and so ignores politically induced responses of tax rates, and hence of government spending, to changes in the efficiency of the tax system.”).

13. See Gerald Korngold, *Land Value Capture in the United States: Funding Infrastructure and Local Government Services* 9 (2022) (reporting that the property tax accounted for seventy-two percent of local tax revenues in 2017).

14. Richard Briffault, Laurie Reynolds, Nestor M. Davidson, Erin Adele Scharff & Rick Su, *Cases and Materials on State and Local Government Law* 730 (9th ed. 2021) (describing the property tax as the “financial mainstay of many local governments”); see also *State and Local Backgrounders: State and Local Expenditures*, Urban Inst., <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/state-and-local-expenditures> (on file with the *Columbia Law Review*) (last visited Feb. 25, 2023) (“Elementary and secondary education is a far larger share of direct local government spending than state spending.”).

15. Erika K. Wilson, *Toward a Theory of Equitable Federated Regionalism in Public Education*, 61 *UCLA L. Rev.* 1416, 1444–45 (2014) (“School districts levy taxes on property that lies within their boundaries and, for the most part, use all of that money to fund their own schools.”).

16. The justice of the laws that help determine the value of *any* objects of taxation—property, income, sales, and the like—should be considered when assessing the justness (including the progressivity or regressivity) of taxing those objects to fund public services. The point that values are not objective but are instead products of the laws that underlie them, though, seems particularly important to emphasize in the context of taxing property for the purpose of funding public education for the reasons set out above. See *supra* text accompanying notes 13–15.



first-order issue of how the land at which property taxes take aim gains its value in the first place.

A. *Second-Order Inquiries: Accepting Property Values as They Are*

The literature on the most oft-discussed issues in the education finance realm—matters of local government autonomy, the redistribution of property tax revenues across jurisdictions, and the overall stability of those revenues—is decidedly vast and complex. Here, though, it is necessary to summarize this literature only to the extent necessary to explain how it largely leaves aside the first-order issue of how land values come to be.

Consider, first, the discourse surrounding *local government autonomy*.<sup>17</sup> Localists varyingly suggest that autonomy advances the values of academic excellence; democratic accountability and participation; community choice; and efficiency.<sup>18</sup> The following pages address these iterations of the autonomy claim in turn.

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17. The very notion of local government autonomy deserves qualification in this context, for the power to tax is not inherent but, rather, is delegated to municipalities by the state. See Richard Briffault, *The Role of Local Control in School Finance Reform*, 24 Conn. L. Rev. 773, 777 (1992) [hereinafter Briffault, *The Role of Local Control*] (“Local governments exist only because they are created by their states . . .”). Some have suggested that states have hidden behind this delegated power to defend themselves against the charge that it is the state’s task—not that of local governments—to finance and deliver public education under most state constitutions. Derek W. Black, *Localism, Pretext, and the Color of School Dollars*, Minn. L. Rev. 1415, 1491 (2023) (“While states may engage local communities to assist in discharging its duty, the state does not relieve itself of constitutional responsibility simply by involving districts.”). Local control has featured prominently in state court decisions addressing equality-based challenges to education policies. See Michael D. Blanchard, *The New Judicial Federalism: Deference Masquerading as Discourse and the Tyranny of the Locality in State Judicial Review of Education Finance*, 60 U. Pitt. L. Rev. 231, 252–56 (1998) (documenting how many state courts, in both decisions that uphold education finance systems and decisions that invalidate them, have consistently demonstrated deference toward local control).

18. Some versions of the local autonomy argument are more directly connected to local finance than others. It seems that advocates who contend that the internalization of administrative costs at the local level generates efficiencies may see *any* financial contributions by the state as inefficient, while advocates who lean on academic excellence, democratic accountability, and community choice may not necessarily oppose state funding so long as localities have the ability to supplement that funding. Briffault, *The Role of Local Control*, *supra* note 17, at 798. Competing perspectives exist on the extent to which state financing in practice limits the operational discretion of local government decisionmaking even when there are no explicit strings attached to that financing. Compare James P. Pfiffner, *Inflexible Budgets, Fiscal Stress, and the Tax Revolt*, in *The Municipal Money Chase: The Politics of Local Government Finance* 37, 57 (Alberta M. Sbragia ed., 1983) (“State aid . . . often diminishes home rule and increases the centralization of control at higher levels of government, for there is a tendency for those who control financing to try also to control policy.”), with Amy Gutmann, *Democratic Education* 143 (1987) (“[T]he best evidence available . . . does not support the conventional wisdom that he who pays the piper calls the tune. The correlation between the amount of state control over local schools and state share of school financing is low . . .”).

Local autonomy contentions grounded in advancing academic excellence focus on the prospect of “alert” local governments experimenting with educational innovations that other local governments will want to replicate.<sup>19</sup> Critics contend that envisioning each local government as, to use Justice Louis Brandeis’s familiar frame, a “laboratory” to “conduct novel social and economic experiments”<sup>20</sup> ignores the disparities in property wealth across jurisdictions that can limit both their ability to conduct such experiments and their ability to emulate those experiments that are conducted by others.<sup>21</sup> Advocates on both sides, then, advance their standpoints on the assumption that property values—and the extant disparities in property values across jurisdictions—are a given.

Local autonomy contentions grounded in accountability and participation center on maximizing the prospects for democratic control. Resting on the Jeffersonian view that local governments are “little republics” in which neighbors collectively determine how to resolve local challenges,<sup>22</sup> supporters of this view suggest that (i) it is relatively easy for small governmental units to disperse information to the persons they represent; (ii) small groups of people who live close to one another are readily organizable around a given cause; and (iii) proximity to local officials allows organized groups to directly influence decisions on matters of special local importance like education.<sup>23</sup> Moreover, they contend, the ability to hold government officials accountable offers a cyclical benefit: Individuals who realize their effect on a particular issue in public life will be compelled to engage on future issues.<sup>24</sup> Critics counter, though, that,

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19. Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 *Colum. L. Rev.* 267, 314 (1998) (explaining that experimentalism often underpins calls for bottom-up policymaking); Michael A. Rebell, *Fiscal Equity in Education: Deconstructing Myths and Facing Reality*, 21 *N.Y.U. Rev. L. & Soc. Change* 691, 708 (1995) (contending that local control “encourages diversity, innovation, and experimentation in education”).

20. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); see also Sharon Jacobs, *On the Mend: The Ninth Circuit Gives San Francisco’s Health Care Security Ordinance the Green Light (For Now)*, 36 *J.L. Med. & Ethics* 431, 431 (2008) (asserting that Brandeis’s maxim extends in theory to local governments); Nestor M. Davidson & Timothy M. Mulvaney, *Takings Localism*, 121 *Colum. L. Rev.* 215, 232 (2021) (same).

21. Peter J. Hammer, *The Fate of the Detroit Public Schools: Governance, Finance and Competition*, 13 *J.L. Soc’y* 111, 144–46 (2012) (asserting that even if a poor school district could gather information on and evaluate educational innovations in other districts, it would be unable to fund the implementation of those innovations).

22. Letter from Thomas Jefferson to John Adams (Oct. 28, 1813), in 13 *The Writings of Thomas Jefferson* 394, 400 (Albert Ellery Bergh ed., 1905).

23. Briffault, *The Role of Local Control*, *supra* note 17, at 795–96 (summarizing the democratic control rationale).

24. Robert A. Dahl & Edward R. Tufte, *Size and Democracy* 41 (1973) (discussing how “citizen effectiveness” can generate further interest in political participation); Gerald E. Frug, *Empowering Cities in a Federal System*, 19 *Urb. Law.* 553, 559 (1987) (explaining the

given the disparities in assessed property tax bases, the only “choice” about which to influence decisions in some municipalities, “if it can be called that,” is the “extent to which they will underfund education.”<sup>25</sup> Again, then, neither position wrestles with the drivers of the differences in the underlying assessed values across jurisdictions.

Both community choice and efficiency versions of the local autonomy argument rest on Professor Charles Tiebout’s image of individual “consumers” sorting themselves among localities based on their preferences for different levels of taxation, regulation, and government-supported services.<sup>26</sup> On this view, in a market in which thousands of municipalities are in competition, people are able to move about in pursuit of the mix that best satisfies their preferences; they can, in effect, “purchase” their desired quantity and quality of government.<sup>27</sup> According to some economists, this self-sorting process is efficient in two respects. First, local governments are directly dependent on the property wealth of their communities for property revenues, and thus will seek to retain and expand that wealth in contest with other municipalities that are doing the same.<sup>28</sup> Second, self-sorting generates small, homogenous communities that require fewer administrative service-provision costs than do larger,

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“participation theory” that “elections may be the only form democracy can take” in states, such that “only in cities . . . can people have the experience of engaging in democratic activity themselves,” and asserting that “the reason for having powerful local governments is to promote this kind of activity”); *Rebell*, *supra* note 19, at 708 (“[T]he local school district remains the most broad-based and effective vehicle for meaningful participatory democracy in American society.”); Aaron J. Saiger, *Local Government Without Tiebout*, 41 *Urb. Law.* 93, 94 (2009) [hereinafter Saiger, *Local Government Without Tiebout*] (“Empowered local politics facilitate individual political participation, which can be distressingly attenuated with respect to more distant state and national authorities.”).

25. Black, *Educational Gerrymandering*, *supra* note 3, at 1409; see also Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 *Stan. L. Rev.* 735, 750 (2018) (contending that local control advantages more affluent communities to the detriment of less affluent ones by relieving those affluent communities of the burden of contributing to a statewide system and affording them the opportunity to out-compete neighboring communities for the best teachers); Nadav Shoked, *An American Oddity: The Law, History, and Toll of the School District*, 111 *Nw. U. L. Rev.* 945, 1014 (2017) (concluding that state “lawmakers . . . [should] consider school districts’ abolition and transfer of educational powers to general governments”).

26. Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. Pol. Econ.* 416, 416–20 (1956).

27. *Id.* at 420 (“The act of moving or failing to move . . . replaces the usual market test of willingness to buy a good and reveals the consumer-voter’s demand for public goods.”); see also Saiger, *Local Government Without Tiebout*, *supra* note 24, at 93 (“By purchasing or renting a home, one also purchases or rents a basket of local public goods.”).

28. William A. Fischel, *The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies* 39–40 (2001) (“[R]eforms should not attempt to divorce the collection of taxes from the decisions to spend and regulate. Local tax collection is an inseparable part of the efficiency of local government.”); Vincent Ostrom, Robert L. Bish & Elinor Ostrom, *Local Government in the United States* 206 (1988) (“[R]ivalry among local governments is analogous to rivalry among firms . . .”).

more heterogeneous communities.<sup>29</sup> Critics challenge the Tieboutian model in varying respects, pointing out the many ways that the consumer–provider picture of the corporate world is not neatly transferable to the local government–citizen context.<sup>30</sup>

More than the other versions of local autonomy claims, the community choice and efficiency versions recognize in some respects the influence of government choices on property values. The focus, though, is on a relatively narrow set of government tools, namely those land use measures such as minimum lot sizes and floor space requirements that homeowners might draw on to exclude newcomers in an effort to preserve home values in their by-now sorted, homogenous communities.<sup>31</sup> This concentration discounts the far broader range of extant property laws that influence property values; the property laws that preceded and precipitated those owners' purchase of their homes; and the reality that choices surrounding property laws protect the interests of some claimants only at the expense of others (such that the enactment of value-enhancing policies in one neighborhood or jurisdiction can produce value-reducing impacts in other neighborhoods or jurisdictions).<sup>32</sup>

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29. Briffault, *The Role of Local Control*, *supra* note 18, at 791–92 (explaining this argument). But see Zachary D. Liscow, *The Efficiency of Equity in Local Government Finance*, 92 *N.Y.U. L. Rev.* 1828, 1836 (2017) (highlighting efficiency virtues of centralized funding schemes).

30. The literature supporting and critiquing the Tieboutian model is incredibly voluminous. See Todd E. Pettys, *The Mobility Paradox*, 92 *Geo. L.J.* 481, 483–84 (2004) (noting, in reference to Tiebout's 1956 article, that "[i]t would be exceedingly difficult to find nine pages of scholarship that have exerted a greater impact on the ongoing debate about federalism and the ideal distribution of power between the state and federal governments"); see also Bruce Hamilton, Edwin Mills & David Puryear, *The Tiebout Hypothesis and Residential Income Segregation*, in *Fiscal Zoning and Land Use Controls: The Economic Issues* 101, 101 (Edwin S. Mills & Wallace E. Oates eds., 1975) (economists are "fond of pointing to the efficiency attributes" of the Tieboutian model while "[c]ivil liberties lawyers" object to the inequities it generates). Critiques that engage directly with the model's implications for education policy include Briffault, *The Role of Local Control*, *supra* note 17; Saiger, *Local Government Without Tiebout*, *supra* note 24; Schragger, *supra* note 8, at 1830.

31. See, e.g., Fischel, *supra* note 28, at 39–71.

32. See, e.g., Fennell, *supra* note 8, at 620, 652–54 (noting how "exclusionary choices can push costs across jurisdictional boundaries within a metropolitan region"). Moreover, individuals' abilities to sort themselves into the local governments of their choice are limited by the distribution of wealth and income. See, e.g., Frug, *City Services*, *supra* note 8, at 31 ("People who live in unsafe neighborhoods or send their children to inadequate schools don't do so because they have taste for them. . . . If they had a choice. . . , they would prefer better schools and less crime."); see also Fennell, *supra* note 8, at 627 ("[D]emographic differences in homeownership rates cannot be wholly attributed to differences in preferences."); Clayton P. Gillette, *Reconstructing Local Control of School Finance: A Cautionary Note*, 25 *Pa. L. Rev.* 37, 40 (1996) ("The Tiebout world . . . is obviously not the world in which we live. People are constrained in their choices of residence by financial and psychological considerations."); Justin R. Long, *Democratic Education and Local School Governance*, 50 *Willamette L. Rev.* 401, 415 (2014) ("For disfavored minorities and the poor, the homogeneity they share with their neighbors is merely their socioeconomic status,

The related discourse on the possibility of the government's *redistributing revenues across jurisdictions* also largely takes property values as they are. Some advocates assert that people who have spent the significant amounts necessary to buy land in affluent districts have "already paid" for the service advantages they enjoy, including school funding sufficient to avoid shared computers, antiquated textbooks, outdated infrastructure, faculty cuts, and the elimination of programs, all of which often plague less affluent districts.<sup>33</sup> Therefore, according to these advocates, residents of more affluent districts should not be charged again through redistributions to less affluent districts.<sup>34</sup> Others, though, lament that school districts with higher assessed property values have the capacity to generate greater revenues than those with lower assessed values at a fraction of the rates.<sup>35</sup> They thereby either support the use of redistributive

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not common values and common dreams of what they want from their children's schools."); Ann R. Markusen, *Class and Urban Social Expenditure: A Marxist Theory of Metropolitan Government*, in *Marxism and the Metropolis* 82–84 (William F. Tabb & Larry Sawers eds., 2d ed. 1984) ("If Tiebout's views were correct, suburban political units would exhibit a wide variety of public-service packages . . . . In fact, the most striking characteristics of suburban units are their . . . nearly identical public-service mixes, with quality of service rising quite consistently with class composition of residents . . . ."); Saiger, *Local Government Without Tiebout*, *supra* note 24, at 105 ("[D]ifferent budget constraints in different jurisdictions are the primary determinants of [individuals'] different choices."). The distribution of wealth and income is itself dictated in meaningful part by our property laws. See Timothy M. Mulvaney & Joseph William Singer, *Essential Property*, 107 *Minn. L. Rev.* 605, 627–38 (2022).

33. See, e.g., Denise C. Morgan, *The New School Finance Litigation: Acknowledging that Race Discrimination in Public Education Is More Than Just a Tort*, 96 *Nw. U. L. Rev.* 99, 143 (2001) (noting the common view that "citizens may withdraw their support from the public school system or reject the community's political leadership in defiance of Robin Hood plans that they feel betray the American tradition of liberal individualism"); Austin Pennington, *Comment, The Texas Education Agency and the Robin Hood Plan: Is Stealing From the Rich Really Giving More to the Poor?*, 12 *Tex. Tech Admin. L.J.* 389, 397 (2011) ("Robin Hood forces property-rich districts to lay off teachers and cut funding for advanced scholastic programming. . . . [P]roperty-rich districts are essentially being punished for having high property values within their school districts. . . ."). Widespread debate persists on the extent to which financing impacts educational quality relative to other variables, such as the makeup of the student body. See, e.g., James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 *Yale L.J.* 2043, 2106–07 (2002) (comparing achievement successes attributable to funding increases to those attributable to affording poor students access to wealthier peer groups).

34. Bruce W. Hamilton, *Capitalization of Intra-jurisdictional Differences in Local Tax Prices*, 66 *Am. Econ. Rev.* 743, 744 (1976) (explaining the argument that "[i]f differential fiscal surpluses are capitalized into demand curves for property, there can be no horizontal inequity in a static world").

35. See Jennifer O'Neal Schiess, *Bellwether Educ. Partners, Prioritizing Equity in School Funding 1* (2021), [https://bellwethereducation.org/sites/default/files/Bellwether\\_PandemictoProgress\\_SchoolFunding\\_Final.pdf](https://bellwethereducation.org/sites/default/files/Bellwether_PandemictoProgress_SchoolFunding_Final.pdf) [<https://perma.cc/5DXS-3H3D>] ("Inequitable access to funding is a foundational driver of inequity in schools. Reliance on local property taxes, which account for a significant portion of school funding in most states, is a root cause of this inequity."); James A. Kushner, *Apartheid in America: An Historical and Legal Analysis of Contemporary Racial Residential Segregation in the*

mechanisms<sup>36</sup> or outrightly oppose reliance on the property tax to finance education.<sup>37</sup> Both sides, then, effectively operate on the premise that some school districts naturally have high property values and others naturally have low property values.

*Revenue stability* debates present a similar story. Some observers claim that financing education through property taxes is prudent because the rate of taxation levied upon the assessed base can be determined after the assessments take place.<sup>38</sup> Therefore, they assert, governments can

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United States, 22 How. L.J. 547, 591 n.98 (1979) (“Studies indicate that moderate income subdivisions fail to generate sufficient revenues to support the cost of providing services. The major component of this service requirement is education.”); Kirk J. Stark, Rich States, Poor States: Assessing the Design and Effect of a U.S. Fiscal Equalization Regime, 63 *Tax L. Rev.* 957, 968 (2010) (“Because of interjurisdictional differences in the value of taxable property, school districts commonly exhibit variation either in per pupil expenditure levels or in the tax rates imposed on local property owners.”). The wealthy and the poor do not, of course, live exclusively in communities with, respectively, high and low assessed property values. See Fischel, *supra* note 28, at 146–48. This does not change the fact, though, that educational inequities tend to correspond to socioeconomic status. Fennell, *supra* note 8, at 651. Others, from a different equity angle, assert that taxing assessed property values to fund public education discriminates against homeowners without school-aged children because these parties’ assessed values are taxed just as heavily as the property values of those persons with children who attend public schools. See Hunkar Ozyasar, Advantages & Disadvantages of Property Taxes Used to Fund Education, Sapling, <https://www.sapling.com/12053235/advantages-disadvantages-property-taxes-used-fund-education> (on file with the *Columbia Law Review*) (last visited Aug. 6, 2022) (“[T]hose who moved into the area when their kids were too old to use the public primary or secondary education system . . . are taxed just as heavily as a family who lives in a house of the same assessed value and has four kids.”). But see Briffault, *The Role of Local Control*, *supra* note 18, at 786–87 (noting the counterargument that, in a democratic society, an educated populace that is capable of evaluating different ways of life is a concern not just for the parents of school-age children but for all members of a community).

36. See, e.g., Dyson, *supra* note 9, at 17 (evaluating reform proposals to the so-called “Robin Hood” education finance scheme in Texas); Reynolds, *Skybox Schools*, *supra* note 4, at 788–97, 809–10 (discussing “systems [that] explicitly seize property tax revenues and redistribute them (or force the local school district itself to distribute them) to districts with less property wealth”); Aaron Jay Saiger, *The Last Wave: The Rise of the Contingent School District*, 84 *N.C. L. Rev.* 857, 893 (2006) (“The only solution [to equalize education spending] is the ‘Robin Hood’ approach of requiring the rich to share most of whatever additional dollars they choose to raise with poor school districts.”).

37. See, e.g., Long, *supra* note 32, at 464 (advocating the abandonment of local school governance); Reynolds, *Skybox Schools*, *supra* note 4, at 809–10.

38. See generally John W. Matthews, *Fiscal Rsch. Ctr.*, No. 109, *Tax Revenue Volatility and a State-Wide Education Sales Tax 1–2* (2005), [https://csf.gsu.edu/files/2014/06/tax\\_revenue\\_volatility\\_and\\_a\\_state\\_wide\\_education\\_sales\\_tax\\_brief.pdf](https://csf.gsu.edu/files/2014/06/tax_revenue_volatility_and_a_state_wide_education_sales_tax_brief.pdf) [<https://perma.cc/49AQ-N6RT>] (comparing the property tax and the sales tax in terms of stability); John V. Winters, *Fiscal Rsch. Ctr.*, No. 164, *Tax Revenue Stability of Replacing the Property Tax With a Sales Tax, 1–3* (2007), [https://csf.gsu.edu/files/2014/06/tax\\_revenue\\_stability\\_of\\_replacing\\_the\\_property\\_tax\\_with\\_a\\_sales\\_tax\\_brief.pdf](https://csf.gsu.edu/files/2014/06/tax_revenue_stability_of_replacing_the_property_tax_with_a_sales_tax_brief.pdf) [<https://perma.cc/4FDS-PVL6>] (same); J. Fred Giertz, *The Property Tax Bound*, 49 *Nat’l Tax J.* 695 (2006) (same); Andrew T. Hayashi, *Countercyclical Property Taxes*, 40 *Va. Tax Rev.* 1, 4–5 (2020) (“To keep property tax revenues stable as property values fall, local governments must raise effective property tax rates—the ratio of property taxes to actual property values.” (emphasis omitted)).

confidently take aim at target revenues in light of the reality that property is less mobile than the bases of sales and income taxes: While shoppers can simply make purchases in another locality to avoid a particular local sales tax and businesses can relocate their headquarters to avoid local income taxes, homeowners cannot so easily avoid property taxes.<sup>39</sup> Critics, though, question the administrability of increasing the rate at which assessed values are taxed on short notice, particularly as a means of counteracting phenomena as significant as bank failures and housing market collapses.<sup>40</sup> Again, then, neither advocates nor critics concentrate on the drivers of the assessed values at which property taxes take aim.

B. *First-Order Inquiry: Addressing the Drivers of Property Values*

As even the foregoing, very crude summary reveals, the discourse on the consequences of the government's choice to tax property values for the purpose of financing education is of crucial importance in evaluating whether that choice is superior to alternative financing schemes. At the same time, though, an exclusive focus on these second-order issues carries the risk of underappreciating the extent to which government choices impact the first-order issue of how the land against which property taxes are levied gains its value at the outset. Such a focus, in turn, allows to fester without rebuttal the commonly held assumption that land values are a natural product of individual initiative and exchange on the open market.

This individualist view is a powerful one in the American psyche.<sup>41</sup> Property owners like to believe that their personal decisions are the

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(footnote omitted)); Andrew M. Reschovsky & Joan Youngman, Local Property Taxes—Improving an Important Revenue Source, N.Y. St. Bar Ass'n J., Oct. 2008, at 27, 29 (“[H]istory demonstrates that property values, and hence property tax revenues, are a much more stable source of revenue than local sales or income taxes . . .”); Daphne Kenyon, Bethany Paquin & Semida Munteanu, Public Schools and the Property Tax: A Comparison of the Education Funding Models in Three U.S. States, Lincoln Inst. Land Pol’y (Apr. 12, 2022), <https://www.lincolnst.edu/publications/articles/2022-04-public-schools-property-tax-comparison-education-models> [<https://perma.cc/2TR9-HVG7>] (“The property tax is . . . a stable tax, as evidenced by its performance relative to the sales tax and income tax each time the economy falls into a recession.”). For various reasons, property tax assessments often represent a fraction of a property’s full market value. Therefore, local governments actually can increase revenues by manipulating their assessment techniques in ways that increase the size of that fraction without having to adjust the tax rate at all. See Briffault et al., *supra* note 40, at 734.

39. Darien Shanske, How Less Can Be More: Using the Federal Income Tax to Stabilize State and Local Finance, 31 Va. Tax Rev. 413, 451 (2012) (arguing that it is “relatively easy to tax property”). See generally Kenyon et al., *supra* note 38 (discussing how shoppers can easily avoid local sales taxes).

40. Howard Chernick, Andrew Reschovsky & Sandra Newman, What’s the Link Between Housing Markets and the Financial Health of Cities?, Housing Matters (July 21, 2021), <https://housingmatters.urban.org/research-summary/whats-link-between-housing-markets-and-financial-health-cities> [<https://perma.cc/UR5N-3EBT>].

41. See, e.g., Jennifer Nedelsky, Private Property and the Limits of American Constitutionalism 250 (1990) (arguing that the belief that “property rights bear a special

creators of what their properties are worth.<sup>42</sup> They can, for instance, make prudent investments by anticipating the buying public's changing preferences or shifts in population centers; alternatively, they can place bad bets.<sup>43</sup> They can engage in sustainable construction; alternatively, they can degrade land via overdevelopment.<sup>44</sup> They can nurture land through strategic plantings; alternatively, they can spoil it through intensive cultivation.<sup>45</sup> These types of personal decisions about what to do and what not to do with their properties, many trust, dictate their properties' values.

Such an individualist streak has long played a prominent role in theoretic debates about the very meaning of property. Indeed, it is common fare to conceive of the institution of property as conveying interests to possess and use resources to the exclusion of others absent the interest holder's consent.<sup>46</sup> This conception of property as predominantly individualist in scope underpins regular accounts of Blackstone's description of property as conferring "absolute dominion,"<sup>47</sup> many

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relation to liberty" is a "psychological experience"); Laura S. Underkuffler, *Tahoe's Requiem: The Death of the Scalian View of Property and Justice*, 21 Const. Comment. 727, 731 (2004) (suggesting that "all of us, on some level, believe" in the idea of "property as protection").

42. This stance is reflected in the common, misbegotten version of the American story that Europeans discovered the vacant lands of the Americas, earned possessory rights to those lands through their or their ancestors' individual labor, and then instituted governments to protect those rights. See Joseph W. Singer, *The Right to Have Property*, Tex. A&M L. Rev. (forthcoming 2023) (manuscript at 4) (on file with the *Columbia Law Review*) [hereinafter Singer, *Right to Have Property*]; Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 Ariz. L. Rev. 237, 247–49 (1989).

43. Underkuffler, *Takings and the Problem of Value*, supra note 6, at 474.

44. C. Ford Runge, M. Teresa Duclos, John S. Adams, Barry Goodwin, Judith A. Martin & Rodrick D. Squires, *Government Actions Affecting Land and Property Values: An Empirical Review of Takings and Givings* 5 (1996).

45. Richard Gray, *Follow the Food: Why Soil Is Disappearing From Farms*, BBC, <https://www.bbc.com/future/feature/follow-the-food/why-soil-is-disappearing-from-farms/> [https://perma.cc/HZ9R-DMJK] (last visited Jan. 31, 2023).

46. See, e.g., Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 Cornell L. Rev. 745, 747 (2009) ("The core image of property rights, in the minds of most people, is that the owner has a right to exclude others and owes no further obligation to them.").

47. See, e.g., Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 Yale L.J. 601, 601–02, 604–05 (1998) (asserting that many property scholars quote Blackstone's "absolute dominion" phrase without noting the qualifying language that he thereafter attached to it); James Y. Stern, *The Essential Structure of Property Law*, 115 Mich. L. Rev. 1167, 1178 n.46 (2017) ("When Blackstone described property as dominion claimed over external things 'in total exclusion of the right of any other individual in the universe,' . . . he may also have had in mind not simply [a] caricatured view of property . . . but the way one property right rules out contradictory ones." (quoting 2 William Blackstone, *Commentaries* \*2)).



varieties of Lockean libertarianism,<sup>48</sup> multiple forms of utilitarianism and its modern cognates in the law-and-economics field,<sup>49</sup> and even some understandings of natural law.<sup>50</sup> Each of these approaches, of course, has its own rich history and nuance. They are tied together, though, in their support of the general notion that individual actors drive property values through their personal decisions about whether to buy, sell, trade, or keep their interests in the self-regulating sphere of the marketplace.<sup>51</sup> On this view, the government is neither responsible for nor heavily involved in the outcomes generated in this private sphere.<sup>52</sup>

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48. See, e.g., C.B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* 263–77 (1962) (describing as “possessive individualism” the classical liberal understanding of property often attributed to Locke).

49. Harold Demsetz, *Toward a Theory of Property Rights*, 57 *Am. Econ. Rev.* 347, 359 (1967) (situating the impetus for establishing individual property rights in individual ordering).

50. See David L. Breau, Note, *A New Take on Public Use: Were Kelo and Lingle Nonjusticiable?*, 55 *Duke L.J.* 835, 862–63 (2006) (“According to the conventional wisdom, the United States in the first century following the Revolutionary War was a ‘quintessentially Lockean’ society exemplified by economic individualism and vested natural rights in which the law’s primary purpose was to ensure that private property owners retained virtually uncontrolled dominion over [their] property.”).

51. Joseph William Singer, *Legal Realism Now*, 76 *Cal. L. Rev.* 465, 534 (1988) (reviewing Laura Kalman, *Legal Realism at Yale: 1927–1960* (1986)) (“[T]he classical view [is] that the market is a self-regulating system made up of individual, free transactions fundamentally separate from the public sphere of state power.”).

52. This individualistic account of property continues to undergird various areas of constitutional doctrine. See, e.g., *Deshaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 196 (1989) (asserting that the purpose of the Constitution is “to protect the people from the State, not to ensure that the State protect[s] them from each other”); *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (describing the Constitution as “a charter of negative rather than positive liberties” and contending that “[t]he men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them”). Consider, for example, takings law. Courts have interpreted the Takings Clause to protect against those government choices affecting property that are unfair and unjust absent compensating property owners for any resulting diminution in property values. See, e.g., Timothy M. Mulvaney, *Non-Enforcement Takings*, 59 *B.C. L. Rev.* 145, 195 (2018). In this way, takings law concedes that government choices made in the face of competing claims to resources can negatively impact property values. Underkuffler, *Takings and the Problem of Value*, *supra* note 6, at 466. This body of law, however, rarely considers that, in many cases, the owner claiming that their property has been taken by a government choice owns property that is valuable only because of other government choices (or, in some cases, even the very government choice they are challenging). Abraham Bell & Gideon Parchomovsky, *Givings*, 111 *Yale. L.J.* 547, 566–67 (2001); see also Jeffrey A. Michael & Raymond B. Palmquist, *Environmental Land Use Restriction and Property Values*, 11 *Vt. J. Env’t L.* 437, 438 (2010) (“It is widely assumed that legal restrictions can adversely affect the value of real property. . . . However, contrary to this general assumption, restrictions may also positively affect land values, and the positive effects of restrictions may offset, at least in part, their negative effects.”). It follows that, where the government has in various ways *augmented* the market values of property, compensation awards based on those market values can unjustly enrich those property owners. See Runge et al., *supra* note 44, at 13; Schragger, *supra* note 8, at 1852 (“[T]he suburbanite often behaves as if property value increases that are a product of the state-given

The legal realists, though, adeptly highlighted that property law does not merely confer entitlements on individuals and let the chips fall where they may in the private market; it also serves a communal function.<sup>53</sup>

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power to incorporate and zone are ‘earned’ and not ‘taken,’ but contrary state attempts to distribute localized property taxes to poorer neighbors are ‘taken’ but not ‘earned.’”). Such awards afford the owners compensation for not only their equity in their properties but also the windfall to those properties established through public expense. Edward Thompson Jr., *The Government Giveth*, *Env’t F.*, Mar./Apr. 1994, at 22, 24.

Admittedly, there are select instances in which takings law might be considered to recapture some such windfalls. Bell & Parchomovsky, *supra*, at 596–601. For one example, some jurisdictions limit the amount of compensation owed where condemning part of a parcel for a public project renders the remainder of that parcel more suitable for economically beneficial uses. See *United States v. Fort Smith River Dev. Corp.*, 349 F.2d 522, 525 (8th Cir. 1965) (interpreting federal legislation to require consideration of whether condemning land to enhance a river channel rendered the remainder more valuable by improving its suitability for more intensive industrial uses). Those limits, however, have no impact on those who own property that, given its proximity to the public project, benefits from that project but who are not themselves subject to any affirmative condemnation action. For another example, regulatory takings law at times references the “average reciprocity of advantage” conferred by state choices surrounding property. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 140 (1978) (Rehnquist, J., dissenting) (citing *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)). Even in those instances, though, the value-enhancing nature of a given state choice is often highlighted only to declare that claimants have not suffered a loss rather than to recognize that they have experienced a gain. Underkuffler, *Takings and the Problem of Value*, *supra* note 6, at 471 (arguing that environmental restrictions on land imposed by the government usually do not seriously reduce the land’s value). Outside the takings context, a number of mechanisms could be construed as crude measures aimed at offsetting such windfalls. See Korngold, *supra* note 13, at 9, 12–14 (discussing exactions, impact fees, tax-increment financing, special assessments, incentive zoning, and transferable development rights); Martim O. Smolka, *Lincoln Inst. Land Pol’y, Implementing Value Capture in Latin America: Policies and Tools for Urban Development 2* (2013), [https://www.lincolnst.edu/sites/default/files/pubfiles/implementing-value-capture-in-latin-america-full\\_1.pdf](https://www.lincolnst.edu/sites/default/files/pubfiles/implementing-value-capture-in-latin-america-full_1.pdf) [<https://perma.cc/83JZ-WWDM>] (“Conventional fiscal policies . . . largely neglect how the costs of providing urban infrastructure and services are socialized, and how their benefits are privatized. The notion of value capture is to mobilize for the benefit of the community at large . . . the land value increments . . . generated by actions other than the landowner’s . . .”); Alterman, *supra* note 8, at 766–72 (surveying a range of “betterment capture” tools employed in various international settings); Jeffrey Chapman, *Value Capture Taxation as an Infrastructure Funding Technique*, 22 *Pub. Works Mgmt. & Pol’y* 31, 33–34 (2017) (discussing various techniques to leverage property value increases for the purposes of financing infrastructure improvements). Much of the modern value capture literature draws inspiration from the 1978 book, *Windfalls for Wipeouts: Land Value Recapture and Compensation*. Windfalls for Wipeouts: Land Value Recapture and Compensation (Donald G. Hagman & Dean J. Misczynski eds., 1978).

53. See, e.g., Morris R. Cohen, *Property and Sovereignty*, 13 *Cornell L.Q.* 8, 28–29 (1927) (“[E]xperience has shown all civilized peoples the indispensable need for communal control to prevent the abuse of private enterprise.”); Walter Wheeler Cook, *Privileges of Labor Unions in the Struggle for Life*, 27 *Yale L.J.* 779, 793 (1918) (describing how property rights govern interactions between people); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 *Yale L.J.* 710, 718 (1917) (describing property rights as governing relationships between people); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial*

Property is a norm-based system that takes into account how the allocation and exercise of property rights affects how people engage with and live alongside one another in a crowded and interconnected world.<sup>54</sup> In this systemic sense, property laws determine which types of social and market relationships are fair game within a democracy that respects all persons as free and equal and which ones are, instead, beyond the pale.<sup>55</sup>

Recognizing that property laws determine which types of social and market relationships are acceptable requires acknowledging that the government *cannot avoid making these determinations*. Consider, for instance, a situation in which one party claims the right to mine subsurface resources and another party claims the right to use the surface free from the instability such mining would cause. The government is obligated to resolve this conflict: In choosing to allocate to one party their claimed right, the government necessarily must deny the claimed right of the other party.<sup>56</sup> In so doing, it determines the nature of the relationship between those parties by setting the terms on which they can thereafter transact.<sup>57</sup> To make these kinds of unavoidable determinations, the government must make evaluative assertions about the kind of society in which we live and to which we aspire.<sup>58</sup> It cannot simply be a behind-the-scenes “watchman”

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Reasoning, 23 Yale L.J. 16, 55 (1913) (describing a property right as “one’s affirmative claim against another”).

54. See, e.g., Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy* 105 (1990) (describing how different property theories affect perspectives on social ordering); Joseph William Singer, *Entitlement: The Paradoxes of Property* 98 (2000) [hereinafter *Singer, Entitlement*] (noting that property rights govern people’s daily interactions); C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. Pa. L. Rev. 741, 742–43 (1986) (noting that property governs relationships between people).

55. See Baker, *supra* note 54, at 743 (“The standards used to determine the content and extent of decisionmaking authority . . . are what I mean by ‘property rules.’ Property rules determine the relevance of various factors, including the behavior and status of people, to the evaluation of a person’s claim to possess some specific decisionmaking authority.”).

56. See Singer, *Right to Have Property*, *supra* note 42 (manuscript at 7) (explaining that property rights “are not ours alone; they originate, and are based on, laws that made it both possible—and impossible—to become an owner”).

57. Robert Hale, *Freedom Through Law: Public Control of Private Governing Power* 10 (1952) (“[A] little reflection will show that wherever the right of private property and the right of free contract co-exist, each party when contracting is inevitably more or less influenced by the question whether he has much property, or little, or none . . . .” (internal quotation marks omitted) (quoting *Coppage v. Kansas*, 236 U.S. 1, 17 (1915))); see also Singer, *Entitlement*, *supra* note 54, at 59 (“Before two parties can enter into a contract, we must define what they own. Otherwise, we cannot determine who is buying and who is selling.”).

58. Property is, in this way, paradoxical: Many Americans hold a deep belief that property *should* be very strongly protected, but there is *no way that it can be*. See Jennifer Nedelsky, *Should Property Be Constitutionalized? A Relational and Comparative Approach*, in *Property on the Threshold of the 21st Century* 417, 427 (G.E. van Maanen & A.J. van der Walt eds., 1996) (“[P]roperty implicates the very core issues of politics: distributive justice and the allocation of power.”); Eduardo M. Peñalver, *Property Metaphors and Kelo v. New*

for property rights.<sup>59</sup> To the contrary, it is omnipresent in *determining the contours of* the property rights and privileges that are the subject of market exchange. It thus is not possible for property values to exist separate and apart from the influence of these governmental choices;<sup>60</sup> as Henry George so profoundly explained, property values are not attributable merely to individual improvements but, in considerable respects, to efforts by the community at large.<sup>61</sup>

It follows from the foregoing that affording greater attention to the first-order issues surrounding the creation of property values can offer a healthy supplement to the ongoing discourse that currently hones in on the second-order consequences—for local government autonomy, revenue stability, revenue redistribution, and beyond—of taxing those values for the purpose of financing education. While it will take a wide range of future efforts to respond effectively to this call, the remainder of this Essay takes two very preliminary steps in this direction. The next Part, Part II, offers a basic taxonomy of the government choices that determine the contours of property rights in an effort to illustrate how these choices influence property values in a variety of ways. Following Part II's

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*London: Two Views of the Castle*, 74 *Fordham L. Rev.* 2971, 2974 (2006) (“When owners prove unwilling or unable to sort out disagreements about . . . spillover effects on their own, the state [has] to make decisions about which spillover effects owners must tolerate and which spillover-creating actions they may not take . . .”); Laura S. Underkuffler, *The Politics of Property and Need*, 20 *Cornell J.L. & Pub. Pol’y* 363, 370 (2010) (“No societally recognized and enforced property right, which is ‘normatively neutral,’ actually exists.”). But see Eric R. Claeys, *Kelo, The Castle, and Natural Property Rights*, in *Private Property, Community Development, and Eminent Domain* 35, 47 (Robin Paul Malloy ed., 2016) (“In all but the most extreme cases . . . the natural law refrains from picking and choosing among owners or land uses.”).

59. See Laura S. Underkuffler-Freund, *Property: A Special Right*, 71 *Notre Dame L. Rev.* 1033, 1042 (1996).

60. See Korngold, *supra* note 13, at 16 (“[O]wners are not responsible for much of the appreciation in the value of their land.”); see also Underkuffler, *Takings and the Problem of Value*, *supra* note 6, at 474 (“The creation of economic value in land is the product of a complex mosaic of both private and public factors.”).

61. In an 1879 treatise, George explained that communities are significant contributors to land values, such that, in his view, landowners should be entitled to any value increases that they individually created (through, e.g., construction of a building) but not to any value increases attributable to community action. Henry George, *Progress and Poverty* (1879); see also Eric T. Freyfogle, *The Land We Share: Private Property and the Common Good* 126–30 (2003) (explaining that, to George, land values arise “from the city itself” and that, short of rejecting the very idea of owning nature, “[w]hat would work . . . and what would fairly protect the public’s interest, [would be] for the public to claim all income attributable to land itself”). George’s influence is evident throughout municipal finance, with no clearer example than the tax-increment financing schemes that have proliferated to fund improvements in various geographical regions on the promise of the future tax benefits resulting from those improvements. See, e.g., Richard Briffault, *The Most Popular Tool: Tax Increment Financing and the Political Economy of Local Government*, 77 *U. Chi. L. Rev.* 65, 65–66 (2010). For a survey of the critiques of George’s work, see Robert V. Andelson, *Critics of Henry George: An Appraisal of Their Strictures on Progress and Poverty* (1979).

revelations on the breadth and depth of these value-influencing choices, Part III sets out several components of a general framework to assess the justness of such choices.

## II. BENEATH PROPERTY TAXES: A BACKGROUND INFRASTRUCTURE OF PROPERTY LAWS

Property laws, as set out in the prior Part, reflect government choices to allocate interests in land and other resources in the face of competing individual claims. These laws set the terms of private exchange and therefore influence property values in considerable respects. As this Part illuminates, the government choices that constitute the laws of property come in a variety of forms and influence property values in a variety of ways. These influences are in some situations direct, while in others, they are derivative; they appear suddenly in some cases, while in others, they reveal themselves over time; and they can, depending on the circumstances, lead to either increases or decreases in property values in various magnitudes.

Drawing on a range of illustrative examples, this Part classifies the government's choices affecting land values into three overarching categories: *structural choices* relating to infrastructure and land use, *financial choices* relating to subsidies and exemptions, and *protective choices* relating to forestalling natural- and human-induced adversities. That there is some overlap among these categories is readily conceded, and, indeed, some readers may share different perspectives as to the category into which a specific illustrative government choice might be best placed. The point in articulating these categories and offering illustrations therein, though, is not to offer a comprehensive account of those government choices that influence property values but, instead, to present an accessible framework within which readers can grasp the sheer ubiquity of these choices.

### A. *Structural Choices*

One can begin considering the range of structural choices that impact property values with a look at transportation infrastructure. While canals, rails, and roads were often privately financed in the early days of our nation, the government regularly allocated the lands through which those networks traversed to private parties via land grants or other government-supported initiatives.<sup>62</sup> Today, a sizable percentage of our transportation

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62. See John Bell Rae, *Federal Land Grants in Aid of Canals*, 4 J. Econ. Hist. 167–77 (1944). Reflecting the dark underbelly of landholdings across much of America, the government had secured much of the land that it allocated to private parties for transportation projects via conquest against Indigenous populations that had occupied and lived on the land for centuries. See generally Robert J. Miller, *Native America, Discovered and Conquered: Thomas Jefferson, Lewis & Clark, and Manifest Destiny* (2006) (describing

infrastructure is financed directly through government entities.<sup>63</sup> The location and design of this infrastructure has a marked effect on property values.

Consider, for instance, how lands throughout the Appalachians faced increased demand when they were touched by roadway expansion in the early 1800s, giving them new connections to the bustling ports of the Eastern seaboard.<sup>64</sup> These connections, in turn, triggered land value increases in and around those Eastern ports.<sup>65</sup> Anxious to reap these same types of fruits, cities in what was then the “Northwest,” such as Cincinnati, Cleveland, and Columbus, supported the construction of a canal network that linked the Great Lakes to the Ohio–Mississippi River systems.<sup>66</sup> In each of these instances, the government coordinated with private businesses to make transportation accessible at a relatively low cost and thereby increase the possibility of these businesses securing higher profits.<sup>67</sup> The government-created cost savings were soon capitalized into land prices in and around the regions served by this new infrastructure.<sup>68</sup>

Rail networks did the same in the decades before the Civil War. New rail lines reinforced the water networks already in place, and cities that built them held a monopoly-like grip on trade.<sup>69</sup> Land in cities like New York increased in value; further, demand from city residents for goods produced outside the city rose, leading to property value enhancements for those forest and agricultural lands connected to the city by rail.<sup>70</sup> The dredging of the Panama Canal in the early 1900s, which reduced the cost of shipping western grain to the East Coast, had a similarly positive effect on the value of farmlands along water routes in California, Montana,

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how U.S. policy makers utilized the law to “subjugate Native Americans and seize their land”).

63. See James McBride & Anshu Siripurapu, *The State of U.S. Infrastructure*, Council on Foreign Rels., <https://www.cfr.org/background/state-us-infrastructure> [https://perma.cc/7VN7-9JSH] (last updated Nov. 8, 2021).

64. See Fed. Highway Admin., DOT, *America’s Highways: 1776–1976*, 16–27 (1977) (describing the Gallatin Plan and other early 19th century federal plans for transportation).

65. Runge et al., *supra* note 44, at 16.

66. Julius Rubin, *An Innovating Public Improvement: The Erie Canal*, in *Canals and American Economic Development* 15–66 (Carter Goodrich ed., 1961).

67. A sizable amount of the property value within many school districts is held not by individual residents but by businesses. See Dyson, *supra* note 9, at 5 (suggesting that, because businesses are often established in particular areas in light of state-financed infrastructure that facilitates the development of those areas, public school students statewide should reap the benefits of those value-enhancing infrastructure choices).

68. Runge et al., *supra* note 44, at 16–17.

69. H.D. Lloyd, *The Story of a Great Monopoly*, *Atlantic* (Mar. 1881), <https://www.theatlantic.com/magazine/archive/1881/03/the-story-of-a-great-monopoly/306019/> [https://perma.cc/694A-66KV] (“The monopoly of the pipelines which the railroads gave it made the Standard the master of the exits of oil from the producing districts.”).

70. Albert Fishlow, *American Railroads and the Transformation of the Antebellum Economy* 93–95 (1965).

Oregon, Washington, and the Dakotas.<sup>71</sup> The development of the interstate highway system several decades later prompted similar cost savings, including reduced commutes that led to property value enhancements along its routes.<sup>72</sup>

These examples are only among the most dramatic; the capitalization of cost savings generated by government investment in transportation infrastructure is a ubiquitous story in all corners of America. Such capitalization is not, though, the full story. Just as government investment decisions in the design, siting, and construction of transportation infrastructure can augment property values in the ways described, they can also generate negative impacts on property values. First of all, lands that were not in the pathway of new canals, rail lines, and roads often saw their property values drop.<sup>73</sup> In effect, value in these lands was redistributed to lands that were in the newly created transportation corridors.<sup>74</sup> Further, though, consumer preferences in land can change over time. For instance, where adjacency to rail lines may once have been considered an amenity, it may today be considered a disamenity—and thereby lead to reductions in property values—due to the noise and air pollution associated with rail traffic.<sup>75</sup> The same story attaches to the provision of various other forms of infrastructure, including those related to water, sanitation, solid waste disposal, recycling, electricity, natural gas, and the like.<sup>76</sup> While the precise

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71. Runge et al., *supra* note 44, at 17.

72. See, e.g., Herbert Mohring, *Land Values and the Measurement of Highway Benefits*, 69 *J. Pol. Econ.* 236, 244–49 (1961) (documenting land value increases associated with decreases in commuting time to downtown Seattle resulting from new highway construction). For a particularly recent iteration, consider how proximity to new light rail stations augments property values. See generally Keith Bartholomew & Reid Ewing, *Hedonic Price Effects of Pedestrian- and Transit-Oriented Development*, 26 *J. Plan. Lit.* 18 (2011) (analyzing forty studies assessing this influence). On the general idea that increases or decreases in traffic can make a parcel more or less desirable, see Christopher Serkin, *A Case for Zoning*, 96 *Notre Dame L. Rev.* 750, 773 (2020) (citing Alois Stutzer & Bruno Frey, *Stress That Doesn't Pay: The Commuting Paradox*, 110 *Scandinavian J. Econ.* 339, 339 (2008)).

73. Runge et al., *supra* note 44, at 18.

74. *Id.* at 20 (“[P]ublic policy on transportation may be said to represent a spatial redistribution of capital appreciation, giving to some landowners while taking from others.”). As discussed *infra* in notes 143 and accompanying text, other lands were so directly in the pathway of new transportation corridors that the people living on these lands—who were overwhelmingly low-income and Black—were displaced. See Raymond Mohl, *Planned Destruction: The Interstates and Central City Housing* 229 (2000) (“It was quite obvious that neighborhoods and communities would be destroyed [by the creation of the federal highway system], but this was thought to be an acceptable cost of creating new transportation routes and facilitating urban economic development.”).

75. Larry C.L. Poon, *Railway Externalities and Residential Property Prices*, 54 *Land Econ.* 218, 223–25 (1978).

76. See, e.g., Richard C. Ready, *Do Landfills Always Depress Nearby Property Values?*, 32 *J. Real Estate Rsch.* 321, 325, 336 (2010) (concluding, upon a “meta-analysis of all available landfill property value impact estimates,” that “20-26% of low-volume landfills do not negatively impact nearby property values” but “essentially all high-volume [landfills] do negatively affect nearby property values”).

effects of government investment in transportation and other infrastructure are difficult to pinpoint, the government's provision of such infrastructure can undeniably augment land values in areas that such infrastructure serves well and contribute to land-value declines in areas that it does not.<sup>77</sup>

Land use regulation's role in determining property values mirrors that of publicly financed infrastructure in many respects. Consider, for example, the most traditional of these regulations: zoning. Zoning schemes can, all else being equal, undoubtedly create a development effect that impairs property values by limiting the intensity of allowable uses of an owner's property.<sup>78</sup> At the same time, though, zoning schemes limit the intensity of allowable uses on that owner's neighbors' properties.<sup>79</sup> In this respect, zoning can create reciprocal amenity effects that make a region a desirable place in which to live and invest, thereby boosting property values.<sup>80</sup> Moreover, zoning can generate positive scarcity effects: By limiting the amount of development that can occur in an area, the value of the opportunity to develop those undeveloped properties that remain developable—and, of course, the value of already developed properties—can increase.<sup>81</sup> All of these effects, too, may have derivative

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77. OECD, *Financing Transportation Infrastructure Through Land Value Capture: Concepts, Tools, and Case Studies*, OECD Reg'l Dev. Papers (2022), <https://doi.org/10.1787/8015065d-en> [<https://perma.cc/T7P2-YN5Z>] (discussing strategies for recouping costs of new transportation infrastructure).

78. Noelwah R. Netusil, *The Effect of Environmental Zoning*, 81 *Land Econ.* 227, 228 (2005) (explaining the uncertain effects of environmental zoning on property values).

79. John D. Echeverria, *Regulating Versus Paying Land Owners to Protect the Environment*, 26 *J. Land Res. & Env't L.* 1, 32 (2005).

80. William K. Jaeger, *The Effects of Land-Use Regulations on Property Values*, 36 *Env't L.* 105, 112–14 (2006).

81. See Michael & Palmquist, *supra* note 52, at 438 (“However, contrary to this general assumption, restrictions may also positively affect land values, and the positive effects of restrictions may offset, at least in part, their negative effects.”); Serkin, *supra* note 72, at 776 (explaining how zoning can restrict the supply of housing and create a “mini cartel of existing housing stock”). For example, a regulation that reduces the number of residential units that a developer can construct on a given parcel from twelve to ten may, in fact, benefit that developer because it reduces the total number of opportunities to develop in that area. This restriction in supply could mean that the total value of constructing ten units under this new regime could exceed the total value of constructing twelve units under the prior regime. See George R. Parsons, *The Effect of Coastal Land Use Restrictions on Housing Prices: A Repeat Sale Analysis*, 22 *J. Env't Econ. & Mgmt.* 25, 34–35 (1992) (reporting that an empirical study revealed that land use restrictions within 1,000 feet of the Chesapeake Bay generated a 50% increase in the value of homes with bay frontage and a 14–27% increase in the value of homes in the restricted zone); see also Runge et al., *supra* note 44, at 13 (explaining how urban growth boundaries “result in windfalls to some landowners and losses to others”). The scarcity effects of zoning can result from invidious efforts to exclude. See, e.g., Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 *Harv. L. Rev.* 1841, 1861 (1994). A similar phenomenon has reared its head in the context of school district boundaries, as some communities have successfully sought to “secede” from their school districts to create smaller, more privileged enclaves. See Erika Wilson, *The New School Segregation*, 102 *Cornell L. Rev.* 139, 165–74 (2016) (describing



impacts on property values in nearby communities that are not subject to the zoning regime.<sup>82</sup>

Other land use regulations produce similar effects on value. Consider, for instance, minimum lot sizes and setback requirements;<sup>83</sup> historic preservation ordinances;<sup>84</sup> air and water quality, wetlands, riparian corridor, endangered species, and other environmental regulations;<sup>85</sup> and imperatives surrounding the extraction and depletion of oil, gas, timber, and other natural resources.<sup>86</sup>

Overlain on the line-drawing that much of land use regulation necessarily entails are other governmental decisions to draw boundaries for school districts, business improvement districts, special assessment districts, and the like. Contrary to popular perception, these boundary lines are not incontrovertible but rather are what Professor Aaron Saiger refers to as “contingent[] features of the legal and political landscape.”<sup>87</sup> The government’s affirmative choices about how and where to draw these lines have a hand in predetermining the property tax capacity of those

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the contemporary school district secession movement); EdBuild, *supra* note 4, at 1 (reporting in 2019 that the “wave of secessions is accelerating”). On local tools of secession more broadly, see Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 *Stan. L. Rev.* 1115, 1130 (1996) (“Local boundaries frequently determine the scope of local services.”); Gerald E. Frug, *Is Secession from the City of Los Angeles a Good Idea?*, 49 *UCLA L. Rev.* 1783, 1792 (2002) (explaining how the state delegation of zoning and taxing power to localities gives those localities the power to exclude less affluent populations and to assure that only the affluent benefit from the public services offered in those localities).

82. Michael & Palmquist, *supra* note 52, at 438; Parsons, *supra* note 81, at 25 (reporting that land use restrictions within 1,000 miles of the Chesapeake Bay generated a 4–11% increase in the value of homes as far as three miles outside the critical areas).

83. Bethany R. Berger, *The Illusion of Fiscal Illusion in Regulatory Takings*, 66 *Am. U. L. Rev.* 1, 22 (2016) (“Increasing minimum lot sizes generally leads to higher-income property owners.”).

84. One study revealed that properties in a neighborhood that Chicago deemed historic increased in value by 30–38%, while properties in those areas adjacent to the designated neighborhood increased in value by 29%. Peter V. Schaeffer & Cecily Ahern Millerick, *The Impact of Historic District Designation on Property Values: An Empirical Study*, 5 *Econ. Dev. Q.* 301, 311 (1991).

85. Jaeger, *supra* note 80, at 124–25 (detailing various ways land use regulations can reduce property values).

86. See, e.g., Jerett Yan, *Standing as a Limitation on Judicial Review of Agency Action*, 39 *Ecology L.Q.* 593, 600–01 (2012) (referring to a case in which, “[b]ased on the declarations of two forestry experts, [a] court found that the reduction in economic value [due to regulations that restricted timber harvesting] was sufficiently specific, concrete, and particularized to satisfy the injury-in-fact analysis”).

87. Aaron J. Saiger, *The School District Boundary Problem*, 42 *Urb. Law.* 495, 507 (2010). Professor Richard Briffault calls the popular perception a “pregovernmental” view of boundaries. Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 *Colum. L. Rev.* 346, 387 (1990). See also Schragger, *supra* note 8, at 1856 (“[O]ur current structure of fragmented local government is not the end-product of some idealized market process, but rather the historically contingent result of the deployment of legal and political power.”).

neighborhoods inside and outside the lines.<sup>88</sup> In drawing boundary lines, the government allocates economic power.<sup>89</sup>

The government also impacts property values when resolving on which state-owned lands (or private lands that it will condemn) to site essential services. Transportation hubs, parks, wildlife and nature refuges, schools, hospitals, and protected wetlands, for instance, often enhance property values in their vicinity.<sup>90</sup> Meanwhile, airports, prisons, landfills, hazardous waste depositories, and nuclear power plants are generally correlated with lower property values in nearby neighborhoods.<sup>91</sup>

The foregoing is nowhere near a comprehensive documentation of the many ways in which the government's structural choices surrounding property influence property values. It is sufficient, though, to counter the subliminal assumption underpinning much of education finance discourse that property values result predominantly from private market exchange. This counter is further buttressed by considering the ways in which the government's *financial* choices surrounding property impact property values, a matter to which the next section turns.

#### B. *Financial Choices*

The government's finance-related choices impact property values in myriad ways. Consider, for example, agricultural lands.<sup>92</sup> The federal

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88. Consider, for instance, two property owners, A and B, who have the same income and wealth. A is the wealthiest landowner in a poor school district, while B is the poorest landowner in the neighboring and far more affluent school district. A will bear a higher tax share than B, get lesser services than B, or both, simply because of where the state drew the school district line. These disparities will, in turn, be reflected in A's and B's property values. See Schragger, *supra* note 8, at 1848–50 (“The perception that taxes and services are ‘owned’ by the residents . . . relies on a naturalized view of local boundaries . . . . But . . . the regional geography of fragmented local governments is a product of legal rules. . . . [T]he drawing of the jurisdictional lines is itself a distributional choice.”); Stark, *supra* note 35, at 963 (citing James M. Buchanan, *Federalism and Fiscal Equity*, 40 *Am. Econ. Rev.* 583, 591 (1950)) (“In effect, the decision to draw jurisdictional lines around groups of people results in different fiscal treatment for otherwise similarly situated individuals.”).

89. Long, *supra* note 32, at 402 (explaining that school district boundary lines are “about power”); see also Robert Hale, *supra* note 57, at 1–12 (casting property law as the state's bestowing coercive powers upon private parties).

90. Runge et al., *supra* note 44, at 20–21; see also Bell & Parchomovsky, *supra* note 52, at 575 (explaining how building a new park in neighborhood A might increase the property values in that neighborhood while property values in neighboring B remain that same, such that “the decision to bestow the benefit upon the residents of neighborhood A is a lost opportunity to the residents of . . . B”); Serkin, *supra* note 72, at 773 (citing Elena G. Irwin, *The Effects of Open Space on Residential Property Values*, 78 *Land Econ.* 465, 478 (2002)) (explaining that people pay a premium to live near conserved land such that decisions to zone land conservation or to purchase or otherwise acquire conservation easements affect value).

91. Runge et al., *supra* note 44, at 20–22; Saiger, *Local Government Without Tiebout*, *supra* note 24, at 112.

92. See, e.g., Runge et al., *supra* note 44, at 7 (“In addition to direct federal crop subsidies of various forms, government grazing permits, government-subsidized

government pays farmers across the country tens of millions of dollars per day to urge them not to plant crops on portions of their lands.<sup>93</sup> The goal of these subsidies is to prevent the supply of wheat, corn, and other crops from depressing prices of these commodities to a point that would threaten the country's ability to offer "the world's most abundant and affordable food supply."<sup>94</sup> These payments and the higher commodity prices they generate keep farms in business by maintaining farm incomes and, unsurprisingly, are capitalized into land prices.<sup>95</sup> Myriad other agricultural subsidies—including, for instance, subsidies for conservation improvements, such as soil drainage and erosion control—also increase the value of agricultural lands.<sup>96</sup>

Various other finance-related choices impact land values in similar ways. The income tax deduction for home mortgage interest allows individuals to buy houses that are far more expensive than the homes they could buy in the absence of such a write-off,<sup>97</sup> and homestead exemptions can create an analogous effect.<sup>98</sup> Subsidies for flood insurance make feasible the acquisition and development of properties that private companies would not insure on their own due to their flood vulnerability.<sup>99</sup> Subsidized grazing permits increase the value of the ranch lands to which

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transportation, conservation infrastructure, and credit have all underwritten farm assets and land values.”).

93. Farm Subsidy Information, Env't Working Grp., <https://farm.ewg.org/region.php> [<https://perma.cc/WE3C-BGTR>] (last visited Jan. 31, 2023) (noting the various types of agricultural subsidies provided by the U.S. government).

94. Thompson, *supra* note 52, at 22–23.

95. See, e.g., J. Stephen Clark, K.K. Klein & Shelley J. Thompson, Are Subsidies Capitalized Into Land Values? Some Time Series Evidence From Saskatchewan, 41 *Can. J. Ag. Econ.* 155, 167 (1993) (concluding from a study of farm subsidies across a forty-year period that farm income alone is insufficient to explain long term increases in farm values).

96. See, e.g., Raymond B. Palmquist & Leon E. Danielson, A Hedonic Study of the Effects of Erosion Control and Drainage on Farmland Values, 71 *Am. J. Ag. Econ.* 55, 58–61 (1989) (noting that “the[] data imply that land value would rise . . . if drainage were undertaken” and that studies estimate that a “one-unit reduction in potential erosivity . . . results in an increase in farmland value”); see also Linda Qiu, Farmland Values Hit Record Highs, Pricing Out Farmers, *N.Y. Times* (Nov. 13, 2022), <https://www.nytimes.com/2022/11/13/us/politics/farmland-values-prices.html> (on file with the *Columbia Law Review*) (noting that agricultural subsidies have soared in recent years and explaining that “[t]hose payments, or even the very promise of additional assistance, increase farmland values as they create a safety net and signal that agricultural land is a safe bet”).

97. See, e.g., Thompson, *supra* note 52, at 23 (noting that the income tax deduction “enables people to buy houses almost [twice] as expensive as they could without the write-off”).

98. See, e.g., Berger, *supra* note 83, at 18 (“More than half of states have homestead exemptions reducing the taxes on properties occupied as the owner’s primary residence.”). Of course, property tax rates can themselves affect property values.

99. See Daniel D. Barnhizer, *Givings Recapture: Funding Public Acquisition of Private Property Interests on the Coasts*, 27 *Harv. Env't L. Rev.* 295, 296–97 (2003) (explaining that government policies subsidize the cost of living in floodplains and that those policies maintain “development against rising sea levels, climate change, extreme weather phenomena, and erosion”).

they are assigned.<sup>100</sup> And, of course, various choices specifically related to property tax schemes can themselves affect property values. For example, adopting high property taxes in a given jurisdiction may in some circumstances decrease the values of homes because, with the cost of ownership being so high, the ownership market shrinks;<sup>101</sup> capping the amount by which localities can increase their property taxes to fund schools can generate the same type of effects;<sup>102</sup> and extending property tax abatements to attract specific corporations allows those corporations to maintain property at below-market levels.<sup>103</sup>

As was the case with the structural choices referenced in the prior section, these illustrations merely scratch the surface in terms of the extent to which the government's finance-related choices surrounding property set the terms on which market actors engage in real estate transactions that appraisers lean on in valuing land. As the next section explains, the government's *protective* choices surrounding property complement the value-impacting nature of these structural and financial choices.

### C. *Protective Choices*

The government makes a wide range of choices regarding whether and how to protect property that have a sizable influence on property values. Consider, for illustrative purpose, the parcels at issue in the Supreme Court's rather notorious decision in *Lucas v. South Carolina Coastal Council*.<sup>104</sup>

The headline facts of the *Lucas* litigation are well known. In 1986, after reaping significant returns through his development company's sale of more than 1,000 residential units in a subdivision on a narrow barrier

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100. See, e.g., N.K. Roberts, Economic Foundations for Grazing Use Fees on Public Lands, 45 J. Farm Econ. 721, 726–27 (1963) (reporting empirical evidence indicating that grazing permits on public lands significantly increases the sales price of ranch lands); L. Allen Torell & John P. Doll, Public Land Policy and the Value of Grazing Permits, 16 W.J. Agric. Econ. 174, 178–83 (1991) (same).

101. See IMF, Tax Policy, Leverage and Macroeconomic Stability 7 (2016) (“Housing taxes can also reduce speculative demand for housing, which can be a source of short-term price instability and responsible for long-term price swings . . .”).

102. See Winnie Hu, Cuomo Plans to Push for a Cap on Property Taxes, Wash. Post (Dec. 12, 2010), <https://www.nytimes.com/2010/12/13/nyregion/13cap.html> (on file with the *Columbia Law Review*) (explaining that then-Governor Andrew Cuomo intended that the cap on property tax would give “relief from skyrocketing property taxes that are driving [New Yorkers] from their homes and out of the state”); see also Ctr. on Budget & Pol’y Priorities, Policy Basics: Property Tax Caps 1 (2008), <https://www.cbpp.org/sites/default/files/atoms/files/policybasics-taxcaps.pdf> [<https://perma.cc/MA6P-JWN3>].

103. See Robert W. Wassmer, Property Tax Abatement as a Means of Promoting State and Local Economic Activity, in *Erosion of the Property Tax Base: Trends, Causes, and Consequences* 251–52 (Nancy Y. Augustine, Michael E. Bell, David Brunori & Joan M. Youngman eds., 2009) (contending that property tax abatements in these circumstances deprive the local jurisdiction of property tax revenues that they otherwise would reap from economic growth).

104. 505 U.S. 1003, 1007 (1992).

island in South Carolina, David Lucas acquired from the company two such lots for himself.<sup>105</sup> This barrier island—the Isle of Palms—is especially dynamic due to sand-shifting patterns attributable to a nearby inlet.<sup>106</sup> At various points in the four decades before the suit, accretion resulted in these two lots resting hundreds of feet landward of the ocean’s mean high-water line; at other points in this period, though, erosion placed them completely underwater.<sup>107</sup> While the state’s coastal region had been extensively regulated for some time, these lots were considered developable when Lucas acquired them.<sup>108</sup>

Shortly after Lucas’s acquisition, the state legislature passed the 1988 South Carolina Beachfront Management Act.<sup>109</sup> Relying on new scientific evidence revealing the impacts of erosion resulting from development of the state’s coastline, this statute served in many respects as a last ditch measure to preserve a beach and dune system that protects the public from harm.<sup>110</sup> The Act established a coastal setback line based on historic high-water episodes of the previous four decades and prohibited new development or reconstruction of existing development on any lots—including the two recently acquired by Lucas—seaward of that line.<sup>111</sup> Lucas filed suit seeking compensation for an alleged \$3 million diminution in his properties’ value that he attributed to what he deemed an unconstitutional regulatory taking.<sup>112</sup>

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105. See Vicki Been, *Lucas v. The Green Machine*. Using the Takings Clause to Promote More Efficient Regulation?, in *Property Stories* 299, 304 (Gerald Korngold & Andrew P. Morriss eds., 2d ed. 2009).

106. Jan Goldman-Carter, Protecting Wetlands and Reasonable Investment-Backed Expectations in the Wake of *Lucas v. South Carolina Coastal Council*, 28 *Land & Water L. Rev.* 425, 431 (1993) (“Lucas’ lots came within the erosion baseline, primarily because they were located adjacent to tidal inlets which had not been secured with groins, rip-rap, or other structural erosion control measures.”); James G. Titus, Rising Seas, Coastal Erosion, and the Takings Clause: How to Save Wetlands and Beaches Without Hurting Property Owners, 57 *Md. L. Rev.* 1279, 1335 (1998) (noting that David Lucas’s “lots were about 300 feet from the beach, but because they were near an inlet, the shore had advanced and retreated several times in the preceding few decades”).

107. Been, *supra* note 105, at 311.

108. Apparently, similarly situated lots in all other East Coast states were not developable at the time Lucas acquired his lots. See Carol M. Rose, *The Story of Lucas: Environmental Land Use Regulation Between Developers and the Deep Blue Sea*, in *Environmental Law Stories* 237, 258 (Richard J. Lazarus & Oliver A. Houck eds., 2005).

109. *Lucas*, 505 U.S. at 1008–09.

110. *Id.* at 1007–08; see also Richard J. Lazarus, *Lucas Unspun*, 16 *Se. Env’t L.J.* 13, 29 (2007) (“The Beachfront Management Act sought to put an end to the human folly of placing people, lives, livelihoods, and homes in those places most exposed to the destructive forces of nature.”).

111. *Lucas*, 505 U.S. at 1007.

112. Lucas advocated for a new rule by which the sheer weight of the economic impact resulting from a development restriction of this nature categorically triggers takings liability regardless of whether it mirrors a common law prohibition or otherwise serves an important public interest, such as health and safety or environmental protection. *Lucas v. S.C. Coastal Council*, 404 S.E.2d 895, 898 (S.C. 1991), *rev’d*, 505 U.S. 1003 (1992) (“Lucas maintains

This claim prompts one to consider whether and to what extent governmental choices surrounding South Carolina property law contributed to the fact that Lucas's properties—two vacant lots on a narrow barrier island that protects the mainland against storm-driven wave activity—were worth so much money to begin with. It turns out that only the grace of a slew of the government's property-related choices made it feasible for Lucas to engage in personally lucrative construction on this vulnerable sand spit.

Some of those choices were structural. For instance, the government constructed a bridge to access the island and roads to traverse it,<sup>113</sup> installed sewer, water, and electrical systems to service houses and businesses built thereon,<sup>114</sup> and determined setback and other zoning requirements relating to construction on oceanfront parcels.<sup>115</sup> Others were financial. For example, Lucas benefited from the mortgage interest deduction and from flood insurance that the government underwrote.<sup>116</sup> Many other choices, though, were protective in nature. For instance, the government implemented a range of measures to prevent homes and businesses on the Isle of Palms from being swept away by the sea, including supporting beach replenishment, dune plantings, and the installation of both granite and fiberglass walls along the waterfront to blunt the impact of wave activity.<sup>117</sup> In this case, while the trial court's holding that the state's development restrictions were unconstitutional absent compensation was pending on appeal, those measures failed in spectacular and lethal fashion when Hurricane Hugo roared ashore.<sup>118</sup> The storm, boasting sustained winds of 135 miles per hour, inundated nearly every property on the island with mud and sewage and reduced more than 20% of the homes to

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that if a regulation operates to deprive a landowner of 'all economically viable use' of his property, it has worked a 'taking' for which compensation is due, regardless of any other consideration.").

113. Thompson, *supra* note 52, at 22.

114. *Id.*

115. See Calvert G. Chipchase, *Lucas Takings: Why Investment-Backed Expectations Are Irrelevant When Applying the Categorical Rule*, 24 U. Haw. L. Rev. 147, 172 n.181 (2001); Timothy M. Mulvaney, *Property-As-Society*, 2018 Wis. L. Rev. 911, 915–16.

116. See Thompson, *supra* note 52, at 22.

117. Barnhizer, *supra* note 99, at 325 (“[P]hysical projects which include beach armoring . . . and sand replenishment programs, promote direct givings by reducing risks from floods within their design capacities and promote fiat givings by creating the implication that if the government funded such projects once, it likely will do so again.” (footnote omitted)). The government's structural, financial, and protective choices often, of course, work in concert. For example, after making the structural choice to implement the noted shore protection measures in an effort to assure that coastal properties would not erode as swiftly as they otherwise would, the state made the financial choice to underwrite flood insurance to soften the losses when those shore protection measures inevitably failed. Thompson, *supra* note 52, at 22.

118. Oliver A. Houck, *More Unfinished Stories: Lucas, Atlanta Coalition, and Palila/Sweet Home*, 75 U. Colo. L. Rev. 331, 347 (2004).

rubble.<sup>119</sup> In the hurricane's wake, the federal government provided more than \$300 million in disaster relief funds to provide housing assistance for the displaced, remove debris, and repair or replace infrastructure,<sup>120</sup> and state and local government entities chipped in additional millions.<sup>121</sup> Further, the state amended the Beachfront Management Act to allow property owners to rebuild many of the homes that had been damaged or destroyed.<sup>122</sup>

For the purposes advanced here, it is not material to evaluate whether or the extent to which Lucas's undeveloped properties held "intrinsic" value.<sup>123</sup> Rather, the point is simply that governmental choices to protect property had a nontrivial impact in establishing the conditions under which the market ultimately determined these properties' considerable value.<sup>124</sup> And while the properties at issue in *Lucas* offer a particularly vivid backdrop against which to advance this charge, protective choices affecting property values abound throughout property law. Decisions to live in hazardous locales are routinely shaped by local land use decisions and greatly influenced by state and federal incentive programs. For example, choices to construct levees rather than adopt nonstructural responses to flood risks impact property values;<sup>125</sup> choices on whether to require sellers to disclose hazard zone designations impact property values;<sup>126</sup> choices on whether to apply land use restrictions to existing

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119. Been, *supra* note 105, at 313.

120. Emergency Preparedness: Are We Ready for a 21st Century Hugo?: Hearing Before the Subcomm. on Oversight & Mgmt. Efficiency of the H. Comm. on Homeland Sec., 113th Cong. 9 (2014) (statement of Robert J. Fenton, Jr., Acting Deputy Assoc. Adm'r, Off. of Response & Recovery, FEMA).

121. U.S. Gov't Accountability Off., GAO/RCED-91-150, Disaster Assistance: Supplemental Information on Hurricane Hugo in South Carolina 5 (1991); see also Barnhizer, *supra* note 99, at 296–97.

122. Been, *supra* note 105, at 313–14.

123. See Barnhizer, *supra* note 99, at 366 (noting the challenge of "separating value attributable to [government] givings from value attributable to private investment or action of the private markets").

124. One analyst concluded that "taxpayer-financed improvements contributed to the value of Lucas's property and in all likelihood spelled the difference between its being attractive for development and a financially worthless strip of shifting sand." Thompson, *supra* note 52, at 22; see also Barnhizer, *supra* note 99, at 296–98 ("[M]uch of the value of coastal properties . . . is the direct result of past government programs to mitigate or reallocate the risk of flood losses on coastal properties by attempting to guard coastal landowners against the risks and costs of floods."); *id.* at 299 ("[A]ny government action within coastal floodplains can magnify the value of coastal properties by reducing or reallocating flood risks, increasing the perceived permanence of coastal properties, [or] improving access to coastal properties . . .").

125. Daniel A. Farber, Jim Chen, Robert R.M. Verchick, & Lisa Grow Sun, *Disaster Law and Policy* 26–27 (2d ed. 2010).

126. See, e.g., Cal. Civ. Code § 1103 (2018) (delineating that sellers of real property located in particular hazard zones "shall disclose to any prospective buyer the fact that the property is located within" said zone).

development in hazard-prone areas impact property values;<sup>127</sup> and choices on whether to suppress wildland fires to defend nearby private homes and businesses in the near term or prescribe burns in an effort to manage these fires for the future impact property values.<sup>128</sup> The list of hazard-related choices influencing property values goes on.

Protective choices come in many other forms outside the natural hazards context, too. Take, for instance, land use rules that protect nonconforming uses or allow for variances, special exceptions, or rezoning in the face of topographical or other hardships.<sup>129</sup> Consider, too, licensing programs for real estate agents, contractors, and inspectors.<sup>130</sup> The examples offered in this section merely reflect the tip of the iceberg when it comes to the government's protective choices surrounding property laws that influence property values.

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Property is, in the words of one set of scholars, more a “register of value” than a “creator of value.”<sup>131</sup> Property values rest on choices that the government has made in the face of competing claims and, pace Jeremy Bentham, individuals' expectations—and their expectations about *other individuals' expectations*—regarding what choices the government will make in the future.<sup>132</sup> The government's choices surrounding property rules—to, for instance, construct roads and bridges that facilitate certain land uses (structural choices), subsidize certain land uses (financial choices), and protect certain investments in those land uses (protective choices)—are capitalized into the value of land. It follows that different choices surrounding the content of property rights, past and present, would produce different property values and, thus, different distributions of the property tax revenues that finance public education across a large swath of the country.<sup>133</sup>

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127. See Farber et al., *supra* note 125, at 36.

128. *Id.* at 41.

129. See, e.g., Patrick J. Rohan, A Primer on Conveyancing: Title Insurance, Deeds, Binders, Brokers and Beyond, N.Y. St. Bar Ass'n J., Oct. 2000, at 49, 52 (“[T]he residual value of the property for a conforming use may only be a fraction of its former value as a non-conforming use.”).

130. See, e.g., Richard H. Seamon, Causation and the Discretionary Function Exception to the Federal Tort Claims Act, 30 U.C. Davis L. Rev. 691, 762 (1997).

131. Runge et al., *supra* note 44, at 1.

132. See, e.g., William Cronon, Nature's Metropolis: Chicago and the Great West 23–96 (1991) (explaining that, as word of possible railroad extensions into the American West spread in the late 1800s, the price of land soared and fell based on predictions as to where exactly those rail lines would run).

133. Economists have developed models designed to represent the economic forces at play in various land markets in an effort to illustrate how individuals will behave. These models, though, operate against a backdrop of property laws. Michael & Palmquist, *supra* note 52, at 440. People would behave differently if different laws were in place; therefore, with different laws in place, property values would be different. *Id.*



III. JUSTIFYING PROPERTY TAXES AS A SOURCE OF SCHOOL FUNDING:  
NORMS FOR PROPERTY LAW REFORMS

The prior Part illustrates the ubiquitous nature of the governmental choices that influence property values. It also, though, sheds light on the *inevitability* of the government making these types of choices in the face of competing private claims to property. Consider, for a basic example, the three possible categories of resolutions of a dispute between neighbors regarding the natural flow of surface water. For one, the government could construct a diversionary device that alters the flow of water from one party's property and damages or destroys the other party's property. For another, the government could authorize the parties to construct that same type of diversionary device by either formally permitting it or choosing not to prohibit it. For a third, the government could prohibit constructing diversionary devices. In each case, the government cannot relieve itself from having to decide whether these neighbors' property interests include the freedom to protect their lands from natural surface water flows or the freedom to be secure against the harms of surface water diversions.<sup>134</sup> Conceiving of property values as the product of individual initiative and exchange fails to appreciate that the government's choice to recognize and protect one of these claims necessarily will reject the competing claim. Choices of this nature are in actuality normative assertions about the starting points for the development of market relationships. They are conclusions about the integrity of our social and economic system, in that they determine which interests can be valued in which circumstances and who, in those circumstances, holds what measure of bargaining power.<sup>135</sup> In the words of one prominent property theorist, "There is, in truth, no morally neutral place for [property law] to hide."<sup>136</sup>

It follows that the justice of relying on local property taxes to finance education should be informed by evaluating the justice of the vast series

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134. See Isaac Saidel-Goley & Joseph William Singer, Things Invisible to See: State Action & Private Property, 5 Tex. A&M L. Rev. 439, 487–88 (2018) ("Either an owner has the right to eject a homeless person from his property or the homeless person has a right to enter . . . to save his life. The state cannot fail to act in cases like this; it must allocate the entitlement to someone and deny it to others . . ."). But see *Woods v. Mass. Dep't of Env't Prot.*, No. BACV200700099A, 2011 WL 7788022, at \*6 (Mass. Super. Ct. Jan. 7, 2011) (holding that the State's not enforcing conditions to permits issued to the claimants' neighbors that allow them to build revetments, which allegedly led to destructive erosion on the claimants' property, is best viewed as a dispute between two private parties rather than one that the State necessarily must resolve).

135. See C.B. Macpherson, The Meaning of Property, in *Property: Mainstream and Critical Positions* 1, 11–12 (C.B. Macpherson ed., 1978) (asserting that property "is not thought to be a right because it is an enforceable claim: it is an enforceable claim because it is thought to be a human right," such that "if it is not so justified, it does not for long remain an enforceable claim").

136. See Eric T. Freyfogle, Property and Liberty, 34 Harv. Env't L. Rev. 75, 84 (2010); see also Laura S. Underkuffler-Freund, Takings and the Nature of Property, 9 Canadian J.L. & Juris. 161, 201 (1996) (arguing that "[n]o model of property avoids value choice[s]").

of governmental choices that impact the property values against which those taxes are levied.<sup>137</sup> Contemplating such an evaluation raises a number of challenging inquiries. For instance, what makes an assessed property value just? Which specific property-related policies and laws have stood in the way of securing just values? How far geographically might we look for those policies and laws, and how might we counteract their externalizing impacts? How far temporally might we look for those policies and laws, and how might we counteract the effects of choices made in prior lawmaking eras that linger in the present? This Part begins to sketch a framework for developing property reforms that respond to inquiries of this sort. The framework rests on three norms that seem crucial to endorse if society is to chart a course on education finance that leans in any sizable respect on the assessed values at which property taxes take aim. Addressed in turn below, the first of these norms, circumstance sensitivity, leans toward process-based considerations; the second, antidiscrimination, is principally substantive in nature; while the third, legal integration, offers a conceptual bridge between the first two.<sup>138</sup> Each norm is illuminated through the lens of the types of government choices surrounding property—structural, financial, and protective—explored above.

A. *Circumstance Sensitivity*

In evaluating governmental choices surrounding property, we must pay attention to how things are rather than how we imagine them to be. Perhaps the point is most clearly articulated in the context of rent control: It seems foolhardy for a governmental entity to choose a level at which to control rents by hypothetical reference to a “typical” tenant in the “typical” situation without accounting for the cost of living in the places where working people actually need to live to perform the work they do.<sup>139</sup> Yet examples of circumstance insensitivity abound across governmental choices that influence land values.

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137. Even in a hypothetical world in which all property values across all school districts are equal, though, the justice of the distribution of educational opportunities requires a just administration. See, e.g., Tara Garcia Mathewson, *New Data: Even Within the Same District Some Wealthy Schools Get Millions More Than Poor Ones*, Hechinger Rep. (Oct. 31, 2020), <https://hechingerreport.org/new-data-even-within-the-same-district-some-wealthy-schools-get-millions-more-than-poor-ones/> [<https://perma.cc/Y3V6-QA3J>] (discussing empirical evidence on intra-districting spending indicating that “53 districts across the United States . . . spent a statistically significant amount less state and local money on high-poverty schools than on lower-poverty schools”); see also Ross Wiener & Eli Pristoop, *How States Shortchange the Districts that Need the Most Help*, in *Educ. Tr., Funding Gaps* 5, 6 (2006) (reporting on studies that estimate the extent to which low-income students need more resources than their peers to reach certain basic educational thresholds).

138. See Mulvaney & Singer, *supra* note 32, at 638–53 (advancing these and other norms for property law reforms in the context of the disparities between wealth and income, on one hand, and essential resources on the other).

139. *Id.* at 609–10.

In the context of *structural choices*, for instance, consider decisionmaking around the government's eminent power to acquire property for public uses upon the payment of just compensation. The exercise of this power can lift depressed areas out of poverty by, for example, providing more adequate and affordable housing for the benefit of many people, including the displaced; however, this same power can perpetrate economic segregation by situating land for upmarket development without concern for those forced to move on.<sup>140</sup> The Supreme Court's conclusion in *Kelo v. City of New London* that condemning nonblighted residential properties to create jobs and amplify the local tax base promotes a "public use" as required by the federal Constitution's Fifth Amendment<sup>141</sup> does not attend to this nuance any more than do the statutory restrictions on condemnation enacted by allegedly outraged state legislatures in *Kelo's* wake.<sup>142</sup> Evaluating the justness of a given locality's exercises of eminent domain demands inquiring into the identities of the people who those efforts are displacing—including, in Professor A.J. van der Walt's terms, "the degree of [their] desperation"<sup>143</sup>—and those of the people who are filling their shoes.<sup>144</sup>

Circumstance sensitivity in the context of *financial choices* respecting property is exemplified in Professor Dorothy Brown's proposal to provide income tax deductions for home mortgage interest only in neighborhoods

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140. See Timothy M. Mulvaney, *Progressive Property Moving Forward*, 5 Calif. L. Rev. Cir. 349, 371–72 (2014). In this light, cases such as *Kelo* have been contrasted with the likes of *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), which involved the state's exercise of eminent domain not for economic redevelopment but rather to correct what the state viewed as an insalubrious distribution of land holdings. For a recent decision echoing this distinction, see *Mount Laurel Twp. v. Mipro Homes, L.L.C.*, 878 A.2d 38, 49 (N.J. Super. Ct. App. Div. 2005), *aff'd*, 910 A.2d 617, 620 (N.J. 2006) (upholding the condemnation of property for open space from an owner who planned to build large residential houses thereon because, among other reasons, "development of single-family homes that [would] be affordable only to upper-income families would not serve a comparable public interest").

141. 545 U.S. 469, 483–87 (2005).

142. See Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 Minn. L. Rev. 2100, 2114–48 (2009) (surveying the state legislative measures regarding eminent domain post-*Kelo*).

143. A.J. van der Walt, *Housing Rights in the Intersection Between Expropriation and Eviction Law*, in *The Idea of Home in Law: Displacement and Dispossession* 55, 89 (Lorna Fox O'Mahony & James A. Sweeney eds., 2011).

144. Compare John A. Lovett, "Somewhat at Sea": Public Use and Third-Party Transfer Limits in Two US States, in *Rethinking Expropriation Law I: Public Interest in Expropriation* 93, 118–19 (Björn Hoops, Ernst Marais, Hanri Mostert, Jacques Sluysmans & Leon Verstappen eds., 2015) (discussing a case involving the condemnation of a vacant lot owned by an individual who had been absent for more than five years and owed \$37,000 in taxes and penalties; a lot the municipality subsequently transferred to the nonprofit home-building organization Habitat for Humanity (citing *New Orleans Redev. Auth. v. Burgess*, 16 So.3d 569, 571–74 (La. Ct. App. 2009))), with van der Walt, *supra* note 143, at 70–74 (discussing an English case involving London's eviction of caravans of Romani Gypsies and Irish Travelers to make way for the 2012 Summer Olympics (citing *Smith & Ors v. Sec. of State for Trade & Indus.* [2007] EWHC (Admin) 1013 (Eng.))).

identified as possessing relatively low levels of household wealth due to past discriminatory or otherwise unjust governmental choices.<sup>145</sup> Other proposed alterations to this deduction seek to make similar headway. For instance, William Inden has lamented the idea that homeowners are privy to the deduction whether they build in a revitalizing urban neighborhood or in the middle of an endangered species habitat and, thus, calls for a policy that adjusts the amount of the deduction based on the development's environmental impact.<sup>146</sup>

In terms of the government's *protective choices*, consider the efforts by numerous state legislatures to enact various measures that increase the likelihood that claimants will be awarded compensation for purported regulatory interference with their property rights.<sup>147</sup> Some of these statutes create a remedy of compensation—separate and apart from constitutional takings remedies—when a regulation allegedly diminishes land value beyond a defined threshold<sup>148</sup> or produces an “inordinate burden” on an individual claimant.<sup>149</sup> For example, Mississippi law requires compensation in the face of regulations—say, watering limits—that reduce the market value of a claimant's agricultural lands by more than 40% of their preregulation value.<sup>150</sup> A law of this nature does not account for the reality that compensating a given landowner in such a case would (a) allow them to avoid the costs associated with the challenged regulation (complying with the water restrictions absent compensation) while (b) permitting them to continue to enjoy the positive impact on their property from the

145. Emily Badger, *Can the Racial Wealth Gap Be Closed Without Speaking of Race?*, N.Y. Times: The Upshot (May 10, 2019), <https://www.nytimes.com/2019/05/10/upshot/racial-wealth-gap-2020-candidates.html> (on file with the *Columbia Law Review*).

146. William L. Inden, Comment, Compensation Legislation: Private Property Rights vs. Public Benefits, 5 Dick. J. Env't L. & Pol'y 119, 144 (1996).

147. Davidson & Mulvaney, *supra* note 20, at 237–41.

148. See La. Stat. Ann. § 3:3610 (2019) (requiring compensation for prospective state and local regulations that reduce the market value of agricultural or forest lands by more than 20% of their preregulation value); Miss. Code Ann. §§ 49-33-7, -9 (2023) (requiring compensation for prospective state and local regulations that reduce the market value of agricultural or forest lands by more than 40% of their preregulation value); Or. Rev. Stat. § 195.305 (West 2019) (requiring compensation for prospective state and local regulations that reduce market value in certain circumstances).

149. See Fla. Stat. Ann. § 70.001 (West 2022) (requiring compensation for prospective state and local regulations that “inordinately burden” any property). An “inordinate burden” is defined as government action that:

[D]irectly restricted or limited the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property with respect to the real property as a whole, or that the property owner is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large.

*Id.* § 70.001(3)(e)(1).

150. Miss. Code Ann. §§ 49-33-1 to -17.

continued compliance of all other landowners in the region.<sup>151</sup> Attending to circumstances would foster appreciation for the distinction between the positive and negative economic effects of a broadly applicable regulation and the decidedly positive economic effects of an exemption to a regulation with which others must continue to comply.<sup>152</sup>

Adopting a circumstance-sensitive norm in evaluating governmental choices surrounding the meaning of property interests offers the promise of accounting for factual differences in ways that protect against treating as the same those situations and settings that, for historical reasons or otherwise, are different.

#### B. *Antidiscrimination*

While attending to factual circumstances is critical, we need additional norms to tell us whether those circumstances are acceptable as a matter of social justice. Facts alone cannot, say, define whether a given practice treats people as free, equal, or dignified beings. We need to give normative content to an understanding of these kinds of democratic principles that is consistent with the kind of society we want to advance. One means of doing so is through antidiscrimination laws and policies, which not only must outlaw property relations that deny impartial access to the market—and to the services, including education, that are financed on the basis of market-generated values—but also must undo the continuing effects of past discrimination.<sup>153</sup>

In terms of *structural choices*, the government has deployed transportation infrastructure in especially discriminatory ways. For example, highway construction in urban areas can create physical barriers that perpetuate neighborhood segregation initially brought about by racially restrictive covenants and other racially segregative policies of the past.<sup>154</sup> The city of Rochester has shown, though, that change is possible: It recently dismantled a massive highway loop that had cut through a

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151. The scenario outlined above assumes that either the other landowners who suffered a value diminution exceeding 40% chose not to file a claim, or the other landowners, though they may have suffered a land value diminution, did not experience a diminution exceeding 40%. See Miss. Code Ann. § 49-33-13.

152. Jaeger, *supra* note 80, at 107.

153. See Thomas W. Mitchell, *Growing Inequality and Racial Economic Gaps*, 56 *How. L.J.* 849, 878–79 (2013) (discussing political obstacles to addressing the effects of past discrimination); Erika Wilson, *White Cities, White Schools*, 123 *Colum. L. Rev.* 1221, 1268 (2023) [hereinafter *Wilson, White Cities*] (explaining that “current residential patterns are not [exclusively] the product of individual residential choice but are instead a product of state-facilitated patterns of racial segregation and exclusion”).

154. Adam Paul Susaneck, *Opinion, Mr. Biden, Tear Down This Highway*, *N.Y. Times* (Sept. 8, 2022), <https://www.nytimes.com/interactive/2022/09/08/opinion/urban-highways-segregation.html> (on file with the *Columbia Law Review*).

predominantly Black neighborhood and walled off parts of that neighborhood from the downtown center.<sup>155</sup>

As meticulously documented by scholar Richard Rothstein, many *financial choices* surrounding property laws made in the first half of the twentieth century contributed in substantial respects to the racial segregation of residential neighborhoods that, in many parts of the country, continues to this day.<sup>156</sup> For example, the government gave developers federal loans on the condition that those developers would sell only to whites, preventing diverse, working-class suburban neighborhoods from proliferating;<sup>157</sup> maintained tax-exempt status for churches, educational institutions, and hospitals despite their promotion of racially restrictive covenants;<sup>158</sup> and exploited the racial boundaries it created by providing sizable tax breaks for single-family home ownership while dedicating little funding to transportation projects that could carry African Americans to job opportunities that would diminish “the inequality on which segregation feeds.”<sup>159</sup>

That same era saw *protective choices* made on discriminatory grounds. For instance, state real estate commissions offered licenses to brokers who deemed it their obligation to facilitate and maintain segregated neighborhoods.<sup>160</sup> The state then endorsed the segregative practices of those brokers. For example, the federal Home Owners’ Loan Corporation issued the notorious redlined maps based on maps used by local brokers, whom the National Association of Real Estate Boards had threatened to discipline if they disrupted racially segregated neighborhood patterns.<sup>161</sup>

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155. *Id.*

156. Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* 11 (2017) (“Racial segregation in housing was not merely a project of southerners in the former slaveholding Confederacy. It was a nationwide project of the federal government in the twentieth century, designed and implemented by its most liberal leaders.”).

157. See *id.* at 87 (“The FHA had its biggest impact on segregation, not in its discriminatory evaluations of individual mortgage applicants, but in its financing of entire subdivisions, in many cases entire suburbs, as racially exclusive white enclaves.”); see also David M.P. Freund, *Colored Property: State Policy and White Racial Politics in Suburban America* 112–14 (2007) (describing redlining); Thompson Ford, *supra* note 81, at 1848 (“Federally subsidized mortgages often *required* that property owners incorporate restrictive covenants into their deeds.”). The federal government attempted to justify these measures of this nature, explains Erika Wilson, “on the grounds that nonwhite, particularly Black, occupancy in an area diminished the value of the property.” Wilson, *White Cities*, *supra* note 153, at 1233–35.

158. Rothstein, *supra* note 156, at 118.

159. *Id.* at 235.

160. Wilson, *supra* note 153 (manuscript at 3–6) (explaining the role that real estate brokers played in segregating neighborhoods in and around Detroit).

161. Keeanga-Yamahatta Taylor, *How Real Estate Segregated America*, *Dissent Mag.* (2018), <https://www.dissentmagazine.org/article/how-real-estate-segregated-america-fair-housing-act-race> [<https://perma.cc/YA9K-PTAN>].

The government continues to reinforce these segregative structural, financial, and protective choices of the past by, for instance, disproportionately channeling low-income African Americans who receive housing aid into the segregated neighborhoods that it previously created.<sup>162</sup> But even in the many instances in which the government has changed its mind—be it on the likes of highway construction, lending, or broker licensing—the effects of its initial choices often endure. For instance, a recent empirical study indicates that 75% of neighborhoods “redlined” as credit risks on government maps in the 1930s simply because of their ethnographic and racial makeup continue to face economic struggles.<sup>163</sup> As one advocate described this state of affairs, “It’s as if some of these places have been trapped in the past, locking neighborhoods into concentrated poverty.”<sup>164</sup> It is not an infringement on property rights to adopt laws that can, over time, rectify these types of historical injustices.<sup>165</sup> Quite the reverse: Doing so would *respect* the institution of property by ensuring that property rights are not unjustly denied to some segments of the population because of discrimination. An antidiscrimination norm

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162. Rothstein, *supra* note 156, at 198–99.

163. Bruce D. Baker, Matthew DiCarlo & Preston C. Green III, Albert Shanker Inst., *Segregation and School Funding: How Housing Discrimination Produces Unequal Opportunity* 4 (2022), <https://www.shankerinstitute.org/sites/default/files/2022-05/SEGreportfinal.pdf> [<https://perma.cc/DYS7-32M5>] (discussing the persistence of “segregation even after explicitly racist housing discrimination was outlawed”); Strand & Mirkay, *supra* note 1, at 271–73 (“Maps of many metropolitan areas tell a powerful story. Redlined areas to which Black people and other people of color were historically restricted are often today areas of concentrated racial or ethnic poverty.”); Tracy Jan, *Redlining Was Banned 50 Years Ago. It’s Still Hurting Minorities Today.*, *Wash. Post* (Mar. 28, 2018), <https://www.washingtonpost.com/news/wonk/wp/2018/03/28/redlining-was-banned-50-years-ago-its-still-hurting-minorities-today/> (on file with the *Columbia Law Review*). The evidence in *Parents Involved in Community Schools v. Seattle School District No. 1* indicating that neighborhood segregation slightly decreased when residential addresses were decoupled from school district assignments potentially offers a rough parallel. 551 U.S. 701 (2007). This evidence could be understood as a counterpoint to the assumption that segregation exists and that we must draw boundary lines in response to it. The boundary lines, on this view, contributed to the segregation in the first place. See, e.g., Erika K. Wilson, *Monopolizing Whiteness*, 134 *Harv. L. Rev.* 2382, 2399 (2021) (contending that drawing local school district boundaries has facilitated the racial monopolization of high-quality schools).

164. Jan, *supra* note 163; see also Baker et al., *supra* note 163, at 7 (highlighting need to intentionally counter the “self-reinforcing” nature of the impact of segregation on school funding, where “the districts that need the most resources tend to receive the fewest” and the “depress[ed] economic outcomes” of these districts’ students perpetuate “the geographic isolation and concentrated poverty that generates lower revenue and higher costs”).

165. The uphill nature of this climb is steep—as Professor Daria Roithmayr explains, for instance, the advantages to whites living in neighborhoods once segregated by explicitly racially discriminatory laws and policies are “locked in” as a result of racial path dependencies, such that the “switching costs” to advance structural changes in terms of upsetting the current residents’ property-based expectations are considerable. Daria Roithmayr, *Locked In Segregation*, 12 *Va. L. Soc. Pol’y & L.* 197, 232–36 (2004).

can prompt an assessment across the full spectrum of governmental choices that influence property values with the aim of ferreting out invidious disparate impacts.

C. *Interdependence*

A third norm—one that in many respects serves as a conceptual bridge that connects the other two—involves recognition of the reality that property laws dovetail. Injustices cannot be alleviated if we tackle these laws in isolation. We must, instead, look to the *full range of laws* to understand not only how benefits and burdens are distributed as a result of a specific government choice but also the reciprocal nature of benefits and burdens within and across interconnected governmental choices. As the California Supreme Court put it, reciprocity of advantage lies

not in a precise balance of burdens and benefits accruing to property from a single law, or in an exact equality of burdens among all property owners, but in the interlocking system of benefits, economic and noneconomic, that all the participants in a democratic society may expect to receive, each also being called upon from time to time to sacrifice some advantage, economic or noneconomic, for the common good.<sup>166</sup>

The assortment of examples available here is incredibly far reaching; indeed, few property laws stand firmly on their own two feet. For a very basic illustration of a situation in which the existence of legal integrations has gone underappreciated, though, consider that states and localities determine the extent of development in fire-prone areas (a *structural choice*) while, in those same areas, federal agencies hold decisionmaking power over fire insurance subsidies (a *financial choice*) and wildfire suppression to protect homes and businesses (a *protective choice*).<sup>167</sup> We cannot simply confine our attention to one type of property choice in assessing the justice of taxing property values to support public education and other services. The justice of the extant allocation of property interests depends on the interconnectedness of these choices.

Ascertaining the particular distributional effect of a particular governmental choice on property values is an immense challenge, given that had one choice not been made, others may have generated different outcomes and altered current opportunities and restrictions in ways that are impossible to know.<sup>168</sup> That this endeavor is challenging, though, is not license to ignore the reality that an incredible breadth of interconnected governmental choices surrounding property are influencing property values. Assessing the justice of any policy that involves taxing such values should involve assessing the justice of these underlying choices in ways that offer a window into their collective impacts.

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166. See *San Remo Hotel L.P. v. City of San Francisco*, 41 P.3d 87, 108–10 (Cal. 2002).

167. Farber et al., *supra* note 125, at 43–44.

168. See Jaeger, *supra* note 80, at 122–26; Schragger, *supra* note 8, at 1830.



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The government chose to construct a bridge that allowed transit to and from the barrier island off Charleston, South Carolina, on which David Lucas and his business partners reaped their fortunes, just as it chose to design highway interchanges in ways that cut off certain neighborhoods from the commercial center of Rochester, New York. The property values against which property taxes are levied on that South Carolinian island and in those Rochester neighborhoods are not determined merely by individual effort and exchange. Rather, they are influenced in substantial part by the government's choices on where and how to build roads.

Decisions regarding transportation infrastructure reflect just one of a vast series of structural, financial, and protective choices that, in concert, constitute the law of property. These choices have marked effects on the values that are taxed in any property tax scheme. To evaluate the justice of a locality's decision to rely on property taxes to fund public education requires evaluating the justice of the property laws in that locality and in those that affect it.

#### CONCLUSION

That governmental choices reflected in our property laws impact property values is in some situations incontrovertibly obvious. Few would deny, for instance, that land that is rezoned to allow greater development capacity usually commands a higher asking price on the market than otherwise similarly situated properties that are not so rezoned, or that land benefitting from a crop subsidy usually commands a higher asking price than otherwise similarly situated properties that are not the beneficiary of such a subsidy. A lack of focus on the full extent to which the government influences property values, though, allows to persist in many circles the assumption that owners, through individual initiative and exchange, earn the weight of the profit potential of the land to which they hold title. Such an assumption is on especially sharp display in the discourse surrounding the question of whether the government should rely in sizable measure on property taxation to fund public education. Centered as it is on local autonomy, revenue stability, and revenue distribution mechanisms, this education finance discourse routinely takes the constitutive elements of its threshold variable—property values—for granted.

This Essay has sought to highlight the ubiquity with which governmental choices about property law impact the property values against which the property taxes that finance education are levied.<sup>169</sup> Such choices go well beyond zoning schemes and crop subsidies; indeed, the

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169. Joseph William Singer, *No Freedom Without Regulation: The Hidden Lesson of the Subprime Crisis* 26–57, 177 (2015) (“Freedom requires regulation, and free markets work only because they are structured by law.”).

breadth and depth of the government's influence on property values through its adoption of property laws and policies—what this Essay terms its structural, financial, and protective choices relating to property—are simply immense. In making choices in favor of one property rule or policy over the alternatives in various contexts, the government is not engaged in a neutral exercise. Rather, the choices it makes are normative assertions about the starting points for the development of the market relationships to which appraisers turn in estimating property values. To evaluate the justness of taxing those values to finance education in a given jurisdiction, therefore, we need to evaluate the justness of the underlying property laws in that jurisdiction.

The Essay has suggested that, to start, such an evaluation should include (i) an examination of a jurisdiction's property laws' sensitivity to the circumstances of how those laws operate in a given community, rather than leaning on assumptions about "typical" communities; (ii) acknowledgment of the current effects of both prior and present-day discriminatory practices surrounding property; and (iii) attention to the ways that property laws do not exist in isolation but instead are intricately integrated. Leaning on these norms to evaluate extant property laws and their alternatives is, of course, a decidedly complex exercise in reflection and prediction. Avoiding such an evaluation, though, requires accepting the status quo of property law—and the property values that the status quo dictates—which is in and of itself staking a claim about justice.<sup>170</sup>

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170. See Hanoch Dagan, *The Craft of Property*, 91 Cal. L. Rev. 1517, 1519–20 (2003) (characterizing decisionmaking about maintaining or reforming property institutions as a normative process informed by human values).